(19,065 and 19,066.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 414.

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KY., APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY.

No. 415.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLANT,

vs.

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the sixth judicial circuit and eastern district of Kentucky, at a regular term begun and held at the Federal Court hall in the city of Covington, Monday, April 6", A. D. 1903, and of our Independence the 127" year.

Court met.
Present: Honorable A. M. J. Cochran, judge.

FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON. } # 2195.

Be it remembered that heretofore, to-wit:—on July 23" A. D. 1903 bill of complaint was filed herein which was and is in words and figures following, to-wit:—

Bill of Complaint.

The Circuit Court of the United States in and for the Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, Kentucky, a Corporation, Complainant,
v.
THE CITY OF COVINGTON, a Municipal Corporation, & John N. Middendorf, the Assessor of the City of Covington, Defendants. } In Equity.

To the honorable the judge of the circuit court of the United States in and for the district of Kentucky:

2 The First National Bank of Covington, Kentucky, a corporation, organized, existing and doing business in the city of Covington, Kentucky, under and by virtue of the act of the Congress of the United States known as the national bank act, and amendments thereto, brings this, its bill, against the City of Covington, a municipal corporation organized and existing under the laws of the State of Kentucky, and John N. Middendorf, the duly elected, qualified and acting city assessor of the city of Covington, and a citizen of said State of Kentucky and an inhabitant of the district of said State of Kentucky.

And thereupon your orator complains and says that it was organized, authorized, permitted and chartered to do business as such national bank in the city of Covington, Kentucky on the 17" day of November, 1884, for a term of twenty (20) years thereafter, up to and including the 17th day of November 1904, the authority so to do

having been issued to it upon said 17th day of November 1884 by the then Comptroller of the Currency of the United States and the said city of Covington.

Covington is a city of the second class in and of the State of Kentucky and is now and was a municipal corporation in Ky. at all the times herein stated; and the said John N. Middendorf is now, and has for more than one year last past, been the city assessor of said city of Covington.

And your orator further complaining says that the Commonwealth of Kentucky by an act of its General Assembly incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments thereto was authorized to engage in the business of banking for a term ending in the year 1906; and by other acts of its General Assembly it incorporated the Northern Bank of
3 Kentucky, and the Farmers Bank of Kentucky, and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906; and it says that it was provided in the various acts incorporating said respective banks, that said banks should through their respective cashiers on the first day of July in each year during the continuance of their charters pay into the treasury of the State fifty cents on each share of $100.00 of stock, which should be in full of all tax or bonus. And your orator says that from the year 1835 up to and including the year 1886, in pursuance of the contracts thus made by the State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State of Kentucky in July of each and every year a tax of fifty cents on each one of its shares of one hundred dollars, although at no time during said period was so great a rate of tax paid to the said Commonwealth upon any other species or kind of property.

Complainant says that beginning with the year 1882 an effort was made to subject the property of the said Bank of Kentucky, and the Farmers bank, and other banks, to the payment of local or municipal taxes in addition to the said tax paid to the State of Kentucky, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes in addition to the fifty cents on each share of one hundred dollars of its capital stock and that was paid to the said Commonwealth.

And complainant says that on and before the 17th day of May, 1886, suits were pending in the courts of the Commonwealth of Kentucky under the styles of The Bank of Kentucky against
4 The City of Frankfort, and The Farmers Bank of Kentucky against The City of Frankfort, and The City National Bank of Paducah, Kentucky, against The City of Paducah, etc., wherein *it* was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

And complainant says that the said Commonwealth of Kentucky by an act of its General Assembly, approved the 17th day of May 1886, entitled: "An act to amend the revenue laws of the Common-"wealth of Kentucky," and by article second thereof under the subject of "Stocks in banks and other institutions" in view of the fact that under the contract it had entered into with said banks whereby, upon a payment by the banks in said State of Kentucky to it annually of fifty-cents on each share of one hundred dollars of their respective stock, they were exempt from the payment of any other tax or bonus during and for the period ending 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky, and provided as follows, to-wit:—

SECTION ONE. "That shares of stock in State and national banks, "and other institutions of loan and discounts, and in all corpora-"tions required by law to be taxed on their capital stock, shall be "taxed seventy five cents on each share thereof equal to one hundred "dollars, or on each one hundred dollars of stock therein owned by "individuals, corporations, or societies, and said banks, institutions, "and corporations shall in addition, pay upon each one hundred "dollars of so much of their surplus, undivided surplus, undivided "profits, or undivided accumulations as exceeds an amount equal "to ten per cent. of their capital stock, the same rate of taxation — is

"assessed upon real estate, which shall be in full of all tax,

5 "State, county and municipal."

And further provided that the auditor of public accounts might, at his option, investigate the books of such banks or institutions for the purpose of ascertaining the surplus &c. and made said banks and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by section two: "The cashier of a bank and the treasurer of "any other institution or corporation whose stock is taxed, shall on "the first day of July in each year, report to the auditor of public "accounts the true amount of the capital stock, and the true amount "of surplus, undivided profits, or undivided accumulations, and "how or in what said surplus, undivided profits, or undivided accu-"mulations is invested, and pay into the treasury the amount of "tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and require an affidavit from him stating the amount of the capital stock &c. of the bank and how the surplus was invested.

SECTION FOUR. "That each of said banks, institutions and corpora-"tions, by its proper corporate authority, with the consent of a ma-"jority in interest of a quorum of its stockholders, at a regular or "called meeting thereof, may give its consent to the levying of said "tax, and agree to pay the same as herein provided, and to waive "and to release all right under the acts of Congress or under the "charters of the State banks to a different mode or smaller rate of "taxation, which consent or agreement to and with the State of "Kentucky shall be evidenced by writing under the seal of such

"bank and delivered to the governor of this Commonwealth; and "upon such agreement or consent being delivered and in considera-
"tion thereof, such bank and its shares of stock shall be ex-
6 "empt from all other taxation whatsoever so long as said tax
"shall be paid during the corporate existence of said bank."

SECTION FIVE. "That said banks may take the proceedings author-"ized by section 4 of this act at any time until the meeting of the "next General Assembly. Provided, they pay the tax provided "in Section 1 from the passage of this act."

SECTION SEVEN. "If any bank, State or national, shall refuse or "fail to pay the tax imposed by this act, or shall fail or refuse to "make the consent and agreement as prescribed in section 4, the "shares of stock of such bank, institution or corporation, and its "surplus, undivided accumulations, and undivided profits, shall be "assessed as directed by section 2 of this act, and the same taxes, "State, county and municipal, shall be imposed, levied and collected "upon the assessed shares, surplus, undivided profits, undivided "accumulations, as is imposed on the assessed taxable property in "the hands of individuals. Provided, that nothing herein con-"tained shall be construed as exempting from taxation for county "or municipal purposes any real estate or buildings owned and "used by said banks or corporations for conducting their business, "but the same may be taxed for county and municipal purposes as "other real estate is taxed."

And your orator further complaining says that the terms and conditions of said act of May 17", 1886, were accepted by, and the contract therein provided for entered into and made with the State of Kentucky by said Bank of Kentucky, Farmers bank and Northern Bank of Kentucky, and by a very large majority of all the banks, both State and national and other institutions of loan and discount in the State of Kentucky. Complainant says that within the time provided by section 5 of said act, and upon the 22" June 1887 at a called meeting of its stockholders, a majority in interest
and of a quorum of its stockholders gave their consent to the
7 levying of the tax thus provided, and agreed to pay same as
in said act provided, and to waive and release all rights of the plaintiff under the acts of Congress or under the charter of the State banks to a different mode or smaller rate of taxation, and authorized the proper officers of the complainant to so agree, consent and waive, and to make and enter into said contract upon the part of this complainant and its shareholders, to and with the State of Kentucky, and to deliver to the governor of said State a writing under seal of complainant and executed by its proper corporate authorities evidencing such agreement, consent and contract to and with the State of Kentucky.

And complainant says that upon the 22nd June 1887 it did deliver to the then governor of the Commonwealth of Kentucky such written agreement and consent, an authenticated copy of which is filed herewith as part hereof marked "Exhibit A," wherein and whereby the State of Kentucky entered into an irrevocable contract

with your complainant, which the said State cannot annul or repeal without the consent of your complainant, and is binding on said State and all its departments, including the defendant, City of Covington.

And your orator further complaining says that it, the complainant had paid said tax as provided in section one of said act, from the passage of said act of the 17th of May, 1886.

And complainant says that upon the first day of July of each and every year since the passage of said act of May 17th 1886, and the making of said contract and agreement with the State of Kentucky, it has made to the auditor of public accounts of said State the reports as — section 2, of said act required, and paid into the treasury of the State of Kentucky a tax of seventy five cents on each of its shares of stock of one hundred dollars, and on the surplus, and on the excess of surplus, and on its real estate, as by said law
8 provided and by the said contract agreed, which tax by it so paid has been accepted and received and retained by the State of Kentucky. It says that it has since regularly and each year paid to defendant City of Covington all the tax assessed or demanded by said city on its real estate and banking building, and there is now no tax claimed by said defendant to be due or owing thereon.

Your orator further complaining says that the rate of taxes assessed by the State of Kentucky upon all other real and personal estate during all of said years beginning with the year 1886, and since that time, has not exceeded in any one year fifty-two and one-half cents on each one hundred dollars of assessed valuation, and during several of said years has been much less, being as low as forty-two and one-half cents on each one hundred dollars valuation during a part of said period.

Complainant avers that the defendant, City of Covington, and all of its officers, including the defendant, John N. Middendorf, are conclusively estopped by former litigation and adjudication between your complainant and said City of Covington to contend in this suit that your complainant has not an irrevocable contract with the State of Kentucky limiting its taxes to those fixed in said act of 17th May 1886, known as the "Hewitt law," and that the said city has not right to assess for taxation for municipal purposes or collect any taxes on any of its shares of stock, or any of its property other than its banking building and the land upon which it is situated.

Complainant says that the State of Kentucky by an act of 11th November 1892 of its General Assembly, which became a law without the signature of the then governor, undertook to provide a different mode of assessing the value of the capital stock and property of complainant and other banks in the State of Kentucky, and to invalidate and repeal the contract entered into by and between it
9 and the State of Kentucky as herein before stated under the act of May 17th, 1886, commonly known as the "Hewitt law," to which invalidation and repeal this complainant never consented or agreed. Said act of 11th of November 1892 constituting the auditor, treasurer and secretary of state a board of valuation and

assessment for fixing the value of the franchise of all banks, and providing that all banks should annually pay a tax on such valuation so fixed, to the State of Kentucky and a local tax thereon to the county, incorporated city, town or taxing district where the bank was situated, and said board of valuation and assessment did fix the value of the franchise of this complainant upon which it should pay tax to the defendant, The City of Covington, for the year 1893 at $719,441.30 and certified the same to the county court clerk of Kenton county, Kentucky, in which county your complainant was and is situated, which clerk certified the same to the city treasurer of defendant, City of Covington, all of which was in accordance with said act of 11th November, 1892, and the defendant's rate of taxation for said year 1893 being two dollars and seven cents on that one hundred dollars valuation made a tax of $14,892.43, which said city claimed to be entitled to receive for city purposes from this complainant, and for which it threatened to distrain and to take other steps by said act authorized, said defendant City of Covington claiming that said contract had been invalidated and repealed; and your complainant having theretofore paid to said defendant, City of Covington, the taxes upon its real estate and banking building that were used in carrying on its business, the said $14,892.30, or any part thereof, not being claimed upon the real estate owned by complainant. Complainant insisting and relying upon its contract made and entered into with the State
10 of Kentucky, as heretofore stated, which exempted it and its shares of stock from all taxation by the City of Covington, and that the said defendant had no right to assess or exact any taxes whatsoever upon its capital stock, or the shares thereof, and that it and its shares of stock were exempted from taxation by the said defendant, and the said defendant, City of Covington, contending that said contract had been by the State of Kentucky invalidated and repealed, and that this complainant and its shares of stock were not by reason of such contract exempt from taxation by the City of Covington, it the complainant, on the 17th of November, 1893, filed its action in equity in the Kenton circuit court against the defendant herein, The City of Covington, the said Kenton circuit court being a court of full and complete jurisdiction in the premises, setting up the making and existence of its said contract with the State of Kentucky and the facts in relation thereto, and all the facts hereinbefore stated, and that the State of Kentucky had no right to announce or repeal said contract and that said act of 11th of November 1892 in so far as it attempted so to do was in violation of the Constitution, both of the United States and of the State of Kentucky, in impairing the obligation of a contract, being in violation of section 10, article 1, of the Constitution of the United States, and of section 19 of the constitution of the State of Kentucky, and relying on its contract as hereinbefore stated made and entered into, and that by reason of said contract it and its shares of stock were exempt from any taxation by the defendant, City of Covington, during the corporate existence of complainant, and by the

prayer thereof prayed that the City of Covington be enjoined and restrained from collecting or attempting to collect said alleged tax of fourteen thousand eight hundred ninety two and 43/100 ($14,892.43) dollars, or any part thereof, and that said
11 alleged claim be adjudged invalid by reason of said contract and for all proper relief, and for its costs, etc. Complainant says that summons was issued upon its said petition in equity so filed, and was executed upon the defendant, The City of Covington, on the 17th of November, 1893, and upon the 27th of November 1893, said defendant, City of Covington, appeared to said petition in said action and filed its demurrer to said petition. And it says that thereafter the judge of the Kenton circuit court, being personally interested in the result of the litigation, declined to preside in said cause of this complainant against the City of Covington, and by agreement said cause was transferred to the Campbell circuit court at Newport, Kentucky, it being a court of full and complete jurisdiction in the premises, and the said cause thereafter proceeded in the said court to a final hearing and determination. It says that said cause having been presented to the said Campbell circuit court, it having been fully advised in the premises, on the 27th of January, 1894, adjudged and decided that the said demurrer of complainant to the said petition in equity, should be overruled, and the defendant failing and refusing to answer in the case, the said Campbell circuit court adjudged and determined that the contract entered into by and between the said plaintiff, the complainant herein, and the State of Kentucky, on the 17th May, 1886, known as the "Hewitt law" was valid and binding and was irrevocable during the existence of this complainant by paying said tax to the State of Kentucky of seventy five cents on each of its shares of capital stock equal to one hundred dollars, and on the excess of its surplus, as in said "Hewitt law" provided, which should be in full of all taxes, State, county and municipal, and that
12 the City of Covington could not demand or collect any taxes whatsoever upon any of its shares of stock, or any of its property except the real estate owned and used by it for conducting its business, and perpetually enjoined the said City of Covington from attempting to collect said alleged tax for said year 1893 by said city claimed. And complainant says that the said City of Covington excepted to said judgment of the Campbell circuit court, and prayed an appeal to the court of appeals of Kentucky therefrom, which appeal was by said Campbell circuit court granted. Complainant says that the defendant, City of Covington, prosecuted said appeal from said judgment of the Campbell circuit court to the court of appeals of Kentucky, and the said matter was presented and submitted to the court of appeals of Kentucky, and the said court thereafter upon the first day of June 1895, adjudged and determined that the written acceptance by complainant of the provisions of said revenue law of 1886, known as the Hewitt law, constituted and irrevocable contract between it and the State of Kentucky during its corporate existence, and that it and its shares of stock were exempted

from any taxes by the defendant, City of Covington, during the corporate existence of complainant, and that the provisions of said act of 11th of November 1892 attempting to authorize such taxation, *was* in violation of the provisions of the Constitution of the United States that no State could pass any law impairing the obligation of a contract, and also violative of the State constitution, and affirmed the judgment of the Campbell circuit court from which the said City of Covington had appealed. The opinion and judgment of said court of appeals of Kentucky in said cause of City of Covington, appellant, against First National Bank of Covington, Ky., appellee, is reported at pages 590 to 646, both inclusive, of volume 97 of the reports of the cases decided by said court of appeals of Kentucky.

13 Complainant says that thereupon upon the 10th day of October 1895 the said court of appeals issued its mandate on said judgment, which mandate is in words as follows, to-wit:—

"THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON, Appellant, *v.* FIRST NATIONAL BANK OF COVINGTON, Appellee.	June 1", 1895. Appeal from a Judgment of the Campbell Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

A. A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Complainant says that said mandate was upon the 2nd day of December, 1895, filed in the said cause in the Campbell circuit court.

Complainant files herewith as part of this bill a certified copy of the entire record in said cause in the Campbell circuit court, all pleadings, orders and judgments, and marks it Exhibit "B."

Complainant further says that the said judgment of the court of appeals of Kentucky in said appeal by the said City of Covington, defendant herein, from the said judgment of the Campbell circuit court, in favor of this complainant in said cause, so adjudging that this complainant had such irrevocable contract with the State

14 of Kentucky, and that the said defendant, City of Covington, by reason of said contract had no right to assess for taxation of this complainant other than its real estate and banking building as hereinbefore stated, or to collect or to attempt to collect any taxes from it or upon its said property or capital stock, or shares of stock or any part thereof, and that its shares of stock are not assessable by the said defendant, City of Covington, for taxation during the corporate existence of complainant, has

never been reversed or modified in any respect, nor was there ever any appeal therefrom, and said judgment and holding by said Campbell circuit court and by the court of appeals of Kentucky was and is final and conclusive between this complainant and the City of Covington; and the question as to the existence of said irrevocable contract by and between it and the State of Kentucky precluding the defendant, City of Covington, from in any way asserting such claim for taxes against it, or against its shares of stock, or any of its property other than its real estate and banking building as hereinbefore stated during its said corporate existence, was and is *res judicata*, and binding and conclusive upon said defendant, City of Covington, and all of its officers and agents, and this complainant, during the term of its corporate existence as hereinbefore stated, and said City of Covington is conclusively estopped from claiming or asserting to the contrary, or assessing for or attempting to collect any tax on its shares of stock or other property or other than its real estate.

And complainant further shows unto your honor that the defendant, City of Covington, notwithstanding the premises is asserting the right and power to assess for taxation for municipal purposes all of the shares of the capital stock of this complainant for
15 the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900; and said City of Covington and its city assessor, John N. Middendorf, are claiming the right and power so to do by reason of the provisions of the act of the General Assembly of the Commonwealth of Kentucky entitled, "An act relating to the taxation of "shares of stock of national banks," approved March 21", 1900, being senate bill No. 188, and chapter 23 of the Session Acts of 1900 of the General Assembly of the Commonwealth of Kentucky, and found on page 65 of the official publication of the acts of said session of said General Assembly. Said act and its preamble being as follows:—

"Whereas the Supreme Court of the United States has lately decided that article three (3) chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky;

SEC. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SEC. 2. For purposes of the taxation provided for by
16 the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies *or* any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: Provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: And provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and that same shall be certified to the proper collecting officers for collecting as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessments of said shares of stock and collection of taxes
thereon, as contemplated by this act may be enforced as as-
17 sessment of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the supreme court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage.

And your orator further complaining says that the said defendant, John N. Middendorf, city assessor of the city of Covington, heretofore on the — day of May, 1900, called upon this complainant and demanded of it that it report to and list with him for taxation for municipal purposes by the City of Covington, all of the shares of stock of this complainant for the years 1893 to 1900 both inclusive; and that in response to said demand its board of directors on the 6th day of June 1900 adopted a resolution directing its president and cashier for the reasons in said resolution set out, being the same as in this bill set forth, not to report to or list with the said city assessor of the city of Covington for taxation any of the shares of its stock, and it furnished a copy of said resolution to the said John N. Mid-

dendorf, city assessor of the city of Covington. A copy of said resolution so adopted by its board of directors and presented to said city assessor of the city of Covington is filed herewith as part hereof marked Exhibit "C."

Your orator further says that heretofore on the — day of June, 1900, the said John N. Middendorf, city assessor of the city of Covington, caused to be executed upon Frank P. Helm, the presi-
18 dent of complainant, a notice in writing calling upon said Frank P. Helm, as president of this complainant to, on or before the 30th day of June, 1900, report to him, said John N. Middendorf, city assessor as aforesaid, at his office and list with him for taxation for municipal purposes by the City of Covington all of the shares of stock of this complainant for the said years 1893 to 1900, both inclusive; and the said John N. Middendorf, city assessor as aforesaid, has announced to said Frank P. Helm, president, and threatened that unless the said Frank P. Helm, as president of complainant will forthwith report to and list with him as such city assessor, for taxation for municipal purposes by the defendant City of Covington, all of the shares of stock of this complainant, that he, the city assessor, as aforesaid, will state the facts to the police judge of the defendant, City of Covington, and cause said police judge to issue a warrant against said Frank P. Helm, the president of this complainant, or its cashier, and move said judge of the police court of the city of Covington, to fine said Frank P. Helm, president, as aforesaid, or said cashier, for failing to report to and list with him as city assessor as aforesaid, all of the shares of stock of this complainant, for taxation for municipal purposes by the City of Covington; and by process of contempt from said court compel said Frank P. Helm, president as aforesaid, or its cashier, to list said shares of stock for taxation for municipal purposes by the City of Covington for each of the years aforesaid, said John N. Middendorf claiming the right and power so to do under and by reason of the provisions of the general law of Kentucky governing cities of the second class in said State, of which class the defendant, City of Covington, is; and especially and particularly section 3179 of the Kentucky Statutes.

Your orator further shows unto your honor that during each of said years 1893, 1894, 1895, 1896 and up to first day of July
19 1897 the capital stock of complainant was $500,000.00 and since then and is now $300,000, divided into shares of one hundred dollars each, which shares during all of said time and now are of a fair cash value of at least one hundred dollars each; and there was levied by the city council of the defendant, City of Covington, upon each one hundred dollars valuation of taxable property within the corporate limits of the said city of Covington a tax of two dollars and seven cents for the year 1893, and two dollars for each of the years 1894 to 1898, both inclusive, and a tax of one dollar and seventy five cents for the year 1899, and one dollar and ninety cents for the year 1900; and there is more than two thousand dollars involved in this litigation, and the tax upon its shares of stock

asserted by said defendant City of Covington would amount to more than two thousand dollars for each and every of said years.

And your orator says that unless enjoined and restrained by this honorable court, the said City of Covington and said John N. Middendorf, city assessor of the city of Covington, will undertake to have the president or cashier of this complainant arrested by warrant from the police court of the city of Covington and the said president or cashier will be required to employ counsel and make defense, or this complainant on their behalf, and in case of proceeding by contempt complainant will be deprived of the services of its said president or cashier, and in any case their time will be taken in defending such proceeding and it will be deprived of their attention essential to its business; and the said City of Covington and its city assessor, John N. Middendorf, will undertake to assess for taxation for municipal purposes by the City of Covington all of the shares of stock of this
20 complainant for each of said years, and collect the tax so assessed and levied. And complainant says that the attempted assessment of its shares of stock and collection of taxes thereon by the city of Covington for municipal purposes, and said proposed arrest of the president or cashier of this complainant is without authority of law, and said act of the said General Assembly of the Commonwealth of Kentucky of 21st of March 1900 is in violation of, and an impairment of the obligations of the contract entered into by and between it, this complainant, and the State of Kentucky upon the 22nd of June, 1887, and as to complainant unconstitutional and void. And complainant says that said action by the City of Covington and by its city assessor, and the attempted assessment or collection of any tax whatsoever from it, or upon its shares of stock as hereinbefore stated, and said act of the General Assembly of the Commonwealth of Kentucky, approved 21st March 1900, hereinbefore referred to, in so far as it attempts to in any way authorize or empower said City of Covington to impose or collect such tax was and is null and void and contrary to the provisions of the Constitution of the United States, and contrary to section 10, article I of said Constitution of the United States, and is an attempted taking of the property of complainant and of its shareholders for public use and without due process of law, and is a taking of their property without just compensation and in violation of and contrary to the provisions of article V. of the amendments to the Constitution of the United States.

And your orator further complaining says that such assessment by defendant, City of Covington, and its assessor, John N. Middendorf, or other officer will be illegal, in violation of complain-
21 ant's contract as has been heretofore in said cause between it and said City of Covington adjudged, and will be unlawful and violative of complainant's contract, will cast a cloud over complainant's shares of stock and of its legal rights, and cause much litigation, and with no tribunal provided by law to which it can appeal for redress save the courts, and damage it and its shareholders

in a way that cannot be repaired or estimated at the common law, but its only remedy is by a bill in equity, and unless restrained by this honorable court the defendants, City of Covington and John N. Middendorf, city assessor, will attempt to assess, levy and collect taxes under said act of 21st March, 1900 and will subject complainant to the embarrassment of much litigation and cast a cloud on its shares of stock, its franchise and property and the effort will be made to arrest its president or cashier and proceed by contempt in said police court, and to collect a penalty imposed by the charter of the defendant on all delinquent tax bills.

And your orator further complaining says that all this is contrary to equity, and tends to the manifest wrong and injury of complainant in the premises; in consideration thereof and forasmuch as complainant is remediless in the premises at and by the rules of law, and can have adequate relief only in a court of equity where matters of this kind are properly cognizable and relievable.

To the end therefor- that your orator may have the proceedings on the part of the City of Covington and its city assessor to assess for taxation and collect any tax, for municipal purposes by said City of Covington, all or any of the shares of it- stock, or its property other than its real estate and banking building, for the years 1893 to 1900 both inclusive, and the proceedings to arrest the president or
22 cashier of this complainant, and thereby to compel said officer to list the said shares of stock for said purposes for said years may be enjoined, and that it may be adjudged that there is an irrevocable contract by and between this complainant and the State of Kentucky upon the continued compliance by it with the provisions of the said act of the General Assembly of the Commonwealth of Kentucky of 17th May 1886, whereby no taxes for municipal purposes can be exacted from it, or imposed upon the shares of stock or any of its property whatsoever of any kind or character, save and except its real estate and banking building where it does business, during or pending the corporate existence of complainant, to-wit:—until and including the 17th November 1904, and that said act of said General Assembly approved March 21st, 1900, in so far as it attempts to impair the validity of said contract be declared null and void and contrary to the provisions of the Constitution of the United States, your orator respectfully prays that a temporary injunction may be granted as follows:—restraining said defendant, City of Covington, and its said city assessor, John N. Middendorf, from assessing or attempting to assess for taxation for municipal purposes by the city of Covington, for the years 1893, to 1900, both inclusive, or any of them, the said shares of stock or any of it, or its capital stock, or its property of any kind or character, and from arresting or attempting to arrest said Frank P. Helm, its president, or its cashier, for failure and refusal to report to and list with the said city assessor said shares of stock for taxation for said purposes for said years; and that upon final hearing said injunction may be made perpetual; and that the contract aforesaid by and between

it and the State of Kentucky be adjudged to be irrevocable
23 during the corporate existence of complainant; and that said act of the General Assembly of the Commonwealth of Kentucky approved March 21", 1900, be declared null and void in so far as it attempts to impair the validity of the contract aforesaid and that such irrevocable contract exists between it and the State of Kentucky is *res judicata*, and that defendant, City of Covington is estopped to claim or assert that plaintiff has not such irrevocable contract.

And may it please your honor to grant unto your orator writ of subpœna, issuing out of and under the seal of this honorable court, directed to said defendants respectively therein, and thereby commanding them and each of them upon a day certain and under a penalty to be therein inserted, to personally be and appear before this honorable court, and then and there to answer the premises (but not under oath), and to stand to and abide by such orders and decree therein as to the court shall seem proper.

And may it please your honor to grant unto your orator such other and further relief in the premises as shall be agreeable to equity and good conscience.

J. W. BRYAN,
Solicitor for the Complainant.

UNITED STATES OF AMERICA, }
State of Kentucky, County of Kenton. }

Frank P. Helm, being first duly sworn, on oath says that he is the president of The First National Bank of Covington, Ky., the complainant in the above entitled cause; that he has read
24 the foregoing bill of complaint and knows the contents thereof to be true, except as to such matters as are therein stated from information and belief, and that as to those things he believes them to be true.

FRANK P. HELM.

Sworn to before me, and subscribed in my presence this 19" day of July A. D., 1900.

R. K. TARVIN,
Notary Public, Kenton County, Kentucky.

My commission expired January 8th, 1902.

EXHIBIT "A."

Exhibit "A" referred to in the foregoing bill of complaint was and is in words and figures following, to-wit:—

A. Shinkle, president. I. D. Fry, cashier.

First National Bank of Covington, Ky.

Capital, $500,000; United States depository; surplus, $160,000.

To his excellency S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking house on Wednesday, June 22", 1887 (notice of time and object of said meeting having been sent to each stockholder), there were represented 3603 of the total 5000 shares of the capital stock of the said bank, and by a unanimous vote of the shares then represented, agreed and consented to accept the provisions of the act of the legislature of Kentucky, chapter No. 1233, article No. 2, passed at the session of 1886.

A. SHINKLE, *President.*
I. D. FRY, *Cashier.*

A copy.
Attest: GEO. G. COULTER, *Auditor.*

EXHIBIT "B."

Exhibit "B" referred to in the foregoing bill of complaint was and is in words and figures following, to-wit:—

STATE OF KENTUCKY.

Campbell Circuit Court.

Pleas before the Honorable C. J. Helm, judge of the Campbell circuit court, at the court house, in Newport, Kentucky, on the 2nd day of December, 1895.

FIRST NATIONAL BANK OF COVINGTON, KY., }
v. }
THE CITY OF COVINGTON. }

Be it remembered that heretofore, to-wit, on the 19" day of December, 1893, the plaintiff, First National Bank of Covington, Ky, by its attorneys filed its transcript in the clerk's office

of the Campbell circuit court against the defendant, City of Covington, in words and figures as follows, to-wit:—

Pleas before the honorable the Kenton circuit court, at the court house, in the city of Covington, on the 27" day of November, 1893.

Honorable George G. Perkins, judge.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON. } # 542.

On November 14", 1893, the said plaintiff filed the following petition and exhibits in said court:—

Kenton Circuit Court.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON. } Petition.

The plaintiff, The First National Bank of Covington, Kentucky, says that it is and was on and prior to the 17" of May, 1886, and hath ever since been a national bank organized and existing under and by virtue of the act of Congress of the United States
27 known as the national bank act and its amendments, and hath ever since its organization been and now is located and doing business in the city of Covington, Kenton county, Kentucky, that the defendant, The City of Covington is a municipal corporation under the laws of the State of Kentucky.

Plaintiff says that the Commonwealth of Kentucky, by act of the General Assembly incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments there was authorized to engage in the business of banking for a term ending in the year 1906; and by other acts of its General Assembly it incorporated the Northern Bank of Kentucky and the Farmers' Bank of Kentucky and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906; and it says that it was provided in the various acts incorporating said respective banks that said banks should through their respective cashiers on the first day of July in each year during the continuance of their charters pay into the treasury of the State fifty cents on each share of $100 in stock, which should be in full of all tax or bonus.

Plaintiff says that from the year 1835 up to and including the year 1886 that in pursuance of the contract thus made by the said State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State in July

of each and every year a tax of fifty cents on each one of its shares of one hundred dollars, although at no time during said
28 period was so great a rate of tax paid to the said Commonwealth upon any other species or kind of property.

Plaintiff says that beginning with the year 1882 an effort was made to subject the property of the said Bank of Kentucky, and the Farmers bank, and other banks, to the payment of local or municipal taxes in addition to the said tax paid to the said State, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes in addition to the fifty cents on each share of one hundred dollars of its stock and that was paid to the said Commonwealth.

And it says that on and before the 17" of May 1886, suits were pending in the courts of this Commonwealth under the styles of the Bank of Kentucky against The City of Frankfort, and the Farmers Bank of Kentucky against The City of Frankfort, and The City National Bank of Paducah, Kentucky, against The City of Paducah &c., wherein it was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

It says that the said Commonwealth of Kentucky by an act of its General Assembly, approved the 17th of May 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and by article second thereof under the subject of "stocks in banks and other institutions" in view of the fact that under the contract it had entered into with said banks whereby, upon a payment by the banks in the State of Kentucky to it annually of fifty cents on each share of one hundred dollars of their respective stock,
29 they were exempt from the payment of any other tax or bonus during and for the period ending 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky and provided as follows, to-wit:—

SECTION 1. "That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

And further provided that the auditor of public accounts might, in his option, investigate the books of such banks or institutions for the purpose of ascertaining the surplus &c., and made said banks

and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by SECTION 2. "The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumula-
30 tions in invested, and pay into the treasury the amount of tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and required an affidavit from him stating the amount of capital stock &c. of the bank and how the surplus was invested.

SECTION 4. "That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stock-holders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of said bank."

SECTION 5. "That said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly:—Provided, they pay the tax provided in section 1 from the passage of this act."

SECTION 7. "If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, un-
31 divided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes State, county, and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations as is imposed on the assessed taxable property in the hands of individuals; provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Plaintiff avers that the terms and conditions of said act of 17th of May, 1886, were accepted by and the contract therein provided for entered into and made with the State of Kentucky by the said Bank of Kentucky, Farmers bank and Northern Bank of Kentucky, and

by a very large majority of all the banks, both State and national, and other institutions of loan and discount in the State of Kentucky.

Plaintiff says that within the time provided by section 5 of said act and upon the 22" of June, 1887, at a called meeting of its stockholders, a majority in interest and of a quorum of its stockholders gave their consent to the levying of the tax thus provided, and agreed to pay the same as in said law provided, and to waive and release all right of the plaintiff under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, and authorize- the proper officers of the plaintiff to so agree, consent and waive, and to make and enter into the said

32 contract upon the part of this plaintiff to and with the State of Kentucky, and to deliver to the governor of said State a writing under the seal of the plaintiff and executed by its proper corporate authorities evidencing such agreement, consent and contract to and with the State of Kentucky.

And it says that upon the 22nd day of June, 1887, it did deliver to the then governor of this Commonwealth such written agreement and consent, an authenticated copy of which is herewith filed as part hereof marked "Exhibit A."

And it says that it paid the said tax as provided in section one of said act from the passage of said act of the 17th of May, 1886.

Plaintiff says that upon the first day of July of each and every year since the passage of said act of 17th of May, 1886, and the making of said contract and agreement with the said State of Kentucky, it has made to the auditor of public accounts the report as by section 2 of said act required, and paid into the said treasury a tax of seventy five cents on each one of its shares of one hundred dollars, and on the surplus, and on the excess of surplus, as by said law provided and by said contract agreed which tax by it so paid has been accepted, received and retained by the State of Kentucky, except the tax by it paid upon the first of July, 1893, a portion of which was to it attempted to be returned as hereinafter stated.

Plaintiff says that the rate of tax assessed by the State of Kentucky upon all other real and personal estate during the years 1886, 1887, 1888, 1889 and 1890 was only forty-seven cents upon each one hundred dollars of its assessed valuation, and during the year- 1891 and 1892 the annual rate of tax upon all other real and personal estate was only forty two cents upon the one hundred dollars

33 of its assessed valuation.

Plaintiff says that upon the first of July, 1893, it made its report to the said auditor of public accounts as by said law and its contract provided, and paid into the treasury of the State the amount of tax by it owing thereon, to-wit: $4500.00 but it says that the said treasurer claiming that the said act of the 17th of May, 1886, had been repealed, and that the contract made by this plaintiff with the State of Kentucky thereunder, although this plaintiff's corporate existence has not ceased, had been by the said State of Kentucky abrogated, and retaining $3057.62 of the sum so paid in by this

plaintiff returned to it the balance with the statement that it should pay a tax at the rate of forty two and a half cents upon the one hundred dollars of the assessed value of its tangible property to the sheriff of the county of Kenton, where its said tangible property was situated, in addition to the sum so retained by him.

Plaintiff says that it at once notified said treasury of Kentucky that it held said balance so retained to it subject to the order of the said treasury of Kentucky; and it says that it now holds said balance so subject to the order of said treasury; and that it hath in no way consented or agreed to any repeal or change of the said act of May 17", 1886, or of its contract made with the State of Kentucky thereunder and in pursuance thereof.

Plaintiff says that the State of Kentucky by an act of its General Assembly which becomes a law upon the 11th of November 1892, without the signature of the governor, undertook to provide for a mode of assessing the value of what is termed "franchises of banks and other corporate institutions," and for that purpose constituted the auditor of public accounts, the secretary of state, and the
34 State treasurer a board of valuation and assessment, and provided that the tangible property of such banks and other corporate institutions should be assessed for the purpose of State taxation by the assessor of the county where such property was situated, and undertook to require of each bank and other institutions in said act named to report to the auditor of public accounts a full statement of all of its property of every kind and the value thereof; and that said board of valuation or assessment deducting from the total value of the property so reported the assessed value of the tangible property of such bank or other institutions, that the balance should be the value of the franchise upon which such bank or other institution should pay a tax of forty two and a half cents upon each one hundred dollars into the State treasury, and should pay a tax at the same rate upon the tangible property to the sheriff of the county where assessed.

Plaintiff says it refused to make any report to the auditor of public accounts and made none under the said act of the 11th of November, 1892, but complied with in every respect its contract with the State of Kentucky, as aforesaid—

Plaintiff says that the said board of valuation and assessment undertook to and did assess and fix the valuation of the franchise of that plaintiff at $719,441.30; and it says that said board claiming to be acting in pursuance of the directions, provisions and requirements of said act of the 11th of November, 1892, have certified to the defendant, The City of Covington, as the valuation of plaintiff's franchise, upon which said defendant is entitled to collect from this plaintiff a tax for the year 1893, said sum of $719,441.30; and plaintiff says that said defendant The City of Covington has undertaken to assess its alleged franchise at the rate of $2.07 on the
35 one hundred dollars for the year 1893 making the sum $14,892.43, which the said defendant is asserting is due and owing to it by plaintiff as a tax upon its said franchise, and no part

of which is claimed as a tax upon the real estate owned by this plaintiff.

Plaintiff says that it has each and every year, including the year 1893, since the making of said contract with the State of Kentucky and the passage of said act of May 17", 1886, paid to the City of Covington all taxes due or owing to it on the real estate and building owned and used by this plaintiff for conducting its business.

Plaintiff says that said defendant on the 30th. of October, 1893, demanded of it payment of said alleged — of $14,892.43 and threatens to and will, unless restrained and enjoined by this court from so doing, restrain the property of this plaintiff for said alleged tax.

Plaintiff says that the defendant, The City of Covington, is not authorized by its charter to assess any of this plaintiff's property other than its real estate or building for taxation, and it has no authority under its charter to collect or demand any tax upon any of its property of any kind or character, except upon said real estate or building.

Plaintiff says that its franchise is not subject to taxation by defendant. It says that the defendant has no right or authority under its charter to assess or tax any of its property, other than its real estate and building and upon which it has, as before stated, paid its taxes to defendant in full.

Plaintiff says that the said act of the General Assembly of the Commonwealth of Kentucky of 11th of November, 1892, and all other laws of the State of Kentucky which attempts to subject this plaintiff or its property to a different mode of taxation than that prescribed in said act of 17th of May 1886, and in said contract made and entered into by and between the said State of Kentucky and the plaintiff under and in accordance with said act of 17th of May, 1886, which contract has been faithfully kept and complied with by this plaintiff, or which in any way subjects this plaintiff or any of its property other than its real estate and building to taxation by the defendant, or authorizes or empowers the defendant to subject this plaintiff or any of its property other than its said real estate and building to the payment of any tax to the said defendant, The City of Covington, are an attempt upon the part of the said State of Kentucky to violate and impair the obligation of the contract entered into by and between said State and this plaintiff, as aforesaid, and are in violation of section ten of article one of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, and are in violation of section twenty, article thirteen, of the constitution of Kentucky in force when said act of 17th of May 1886, was passed and said contract made, and of section nineteen of the present constitution of the State of Kentucky, which was in force when said act of 11th of November, 1892, was passed, and are, therefore, void.

36

Plaintiff prays that The City of Covington, the defendant, its officers and agents be forever enjoined and restrained from destraining or attempting to destrain any of this plaintiff's property for said al-

leged tax claim of $14,892.43 or from attempting to collect same or any part thereof from this plaintiff, and that said claim be adjudged invalid, and that it may have a judgment for its costs and for
37 all proper relief.

J. W. BRYAN,
WM. GOEBEL,
Att'ys for Pl'ff.

STATE OF KENTUCKY, }
Kenton County. }

This affiant, Frank P. Helm, says he is president of the plaintiff, The First National Bank of Covington, Kentucky, and the statements of the foregoing petition are true as he verily believes.

FRANK P. HELM.

Subscribed and sworn before me by Frank P. Helm, this 13th day of November, 1893.

R. K. TARVIN,
Notary Public, Kenton Co., Ky.

EXHIBIT.

Said exhibit is as follows:

(Copy.)

COVINGTON, KY., *Dec.* 24, 1887.

Hon. Excellency S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking house, on Wednesday June 22", 1887, (notice of time
38 and object of said meeting having been sent to each stockholder) there were represented 3603 of the total 5,000 shares of the capital stock of the said bank and by a unanimous vote of the shares, then represented, agreed and consent to accept the provisions of the act of the legislature of Kentucky, chapter No. 1233, acticle No. 2, passed at the session of 1886, approved May 17", 1886.

[SEAL.]

A. SHINKLE, *Pres.*
I. D. FRY, *Cashier.*

A copy.
Attest:

VIRGIL HEWITT,
Assistant & Acting Auditor.

At the time of the filing of the petition the following bond for costs was also filed.

(*Bond for Costs.*)

Kenton Circuit Court.

FIRST NATIONAL BANK, Plaintiff,
v.
CITY OF COVINGTON, Defendant.

We undertake that the plaintiff shall pay to the defendant and to the officers of the court, all costs that may accrue to them in this action in the Kenton circuit court and in any other court to which this action may be carried.

Given under out hands this 14th day of November, 1893.

J. W. BRYAN.

Attest: H. C. HALLAM.

Thereupon a summons issued and was afterwards returned
39 as follows:—

Summons.

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summon the City of Covington to answer in twenty days after the service hereof, a petition in equity in suit numbered 542, filed against it in the Kenton circuit court at Covington, by the First National Bank of Covington, Kentucky and warn it that upon failing to answer, said petition will be taken for confessed, or it will be proceeded against for contempt.

Witness H. C. Hallam, clerk of said court, this 14th day of November, 1893.

H. C. HALLAM, *Clerk.*

Return.

Executed the within summons, November 17", 1893, by delivering a true copy of same to J. T. Thomas, mayor of the city of Covington.

DAN'L KINGSLEY, *S., K. C.*

(Fee 60 cents.)

Order: Dem'r Filed.

At a sitting of said court on November 27", 1893. "The defendant files a demurrer."

Demurrer.

The said demurrer is as follows:—

The defendant, The City of Covington, demurs to the petition because it does not state facts sufficient to constitute a cause of
40 action, nor does it state facts sufficient to support a cause of action.

WM. McD. SHAW,
City Solicitor.

Order.

Thereafter at the same sitting of said court:—

"The judge of this court declines to preside in this case on account of a personal interest in the result. By agreement the case is transferred to the Campbell circuit court at Newport."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that the preceeding — pages contain a complete and true transcript of the record in the cause named in the caption.

Witness my hand this December 15", 1893

H. C. HALLAM, *Clerk.*

Order Campbell Circuit Court.

At a circuit court on the 27th day of January 1894 order was made in words and figures as follows, to-wit:—

Came the court and filed opinion herein; and defendant's demurrer to plaintiff's petition is overruled and defendant excepts.

The opinion referred to in the foregoing order is in words and figures as follows, to-wit:—

41 FIRST NATIONAL BANK, Plaintiff,
v.
CITY OF COVINGTON, Defendant. } #10447.

Opinion.

GERMAN NATIONAL BANK, Plaintiff,
v.
CITY OF COVINGTON, Defendant. } #10449.

Opinion.

These cases are submitted upon a demurrer to the petition in each case.

The plaintiff, in each case, seeks to enjoin the defendant from collecting a local tax on a valuation of its franchises.

The tax in question was imposed upon a valuation authorized and made under article III of the act relating to revenue and taxation, which became a law Nov. 11th, 1892, and its collection is resisted upon the ground that this act impairs the obligation of a contract between the plaintiff and the State, whereby upon the payment of a given tax they are exempted from the payment of all other taxes.

If such contracts exist, whatever may be the opinion of this court as to the power of the legislature, to have made them, the repeated decisions of the court of appeals of this State, and of the Supreme Court of the United States, sustained the plaintiffs in their contention that the tax may not be collected of them,
42 and they are, therefore, entitled to the relief they pray for.

The contract is based upon the due acceptance in due form, manner and time, of the act of the legislature of this State known as the "Hewitt law" which went into effect September 14th, 1886.

That part of the act material to the question in hand is article II. The first section fixes a rate of tax on the shares of stock and surplus in State and national banks, and other institutions of loan and discount, which in the language of the act "shall be in full of all tax, State, county and municipal."

The second and third sections provide the method of ascertaining the amount of stock and surplus &c.

The fourth, fifth and sixth sections are as follows:—

SECTION 4. That each of said banks, institutions or corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidence by writing under the seal of such bank and delivered to the governor of this Commonwealth and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxations whatsoever so long as said tax shall be paid during the corporate existence of such bank."

SECTION 5. The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the
43 next General Assembly—Provided, they pay the tax provided in section 1, from the passage of this act."

SECTION 6. This act shall be subject to the provisions of section eight (8) chapter sixty-eight (68) of the General Statutes.

Section eight of chapter sixty-eight reads thus:—

"All charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1886, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed, provided, that whilst privileges and franchises so granted may be

changed or repealed no amendment or repeal shall impair other rights previously vested."

On behalf of the defendant it is not denied that this act and its acceptance constituted a contract, but it is earnestly insisted that the last section above quoted constituted a part of the contract, and made the contract binding upon the banks for all time, but binding upon the State at its pleasure only.

Mutuality is essential to all executory contracts, the promise of the one party is the consideration for the promise of the other, if for any reason one is not bound then neither is the other.

There is no reason why in respect to its contracts the State occupies any better or different position from other parties to contracts.

The plaintiff as national banks surrender rights and immunities conferred upon them by the act of the Federal Congress under which they were created, and they were substantial and valuable as set forth in the petitions herein and as known to the court as part of the current history of the State and as shown by the decisions
44 of the court of appeals in the cases of Franklin County Court *vs.* Deposit Bank of Frankfort &c. 87 Kentucky, 370, and City National Bank of Paducah *vs.* City of Paducah 10 Ky., Law Reporter, 221, and they agreed on their part to pay the increased rate of taxation and the State agreed on its part that it would pass no law that would authorize any increase of this tax. If it did not agree to do this it did not agree to do anything there in absolutely no consideration to uphold the relinquishment of its rights and privileges the banks enforced under the Federal banking laws and the statutes which existed before the acceptance of the "Hewitt law" has not been disturbed.

The State made them a proposition limiting the time in which it might be accepted, and required a formal acceptance of it. How can the court construe such a contract made by a proposition duly accepted in all its terms to include as one of them, the right of the State at its will to fail in the consideration which alone would have induced the banks to have entered into the contract. Without this construction it was an assumption of an unerased burden of taxation or peace as to a controversy with the subsequent decisions of the court of appeals in Franklin County Court *v.* Deposit Bank of Frankfort demonstrated they were right and the State wrong. With such a construction it is simply an unconscionable bargain.

The act of 1856 reserves the right to repeal or amend unless a contrary interest be therein plainly expressed.

It is claimed that the "Hewitt law" would have been governed by it without an express reference to it and that the reference to it must there*of* be held to negative any interest to waive or relinquish the right to amend or repeal.

But in this case the very subject matter forbids such a con-
45 struction unless the State give immunity from other taxation during the life of the charters of the banks they gave nothing and the contract is not binding on the banks, and as to them, as if *they* had never been a "Hewitt law." But this court will not

so construe the contract. It believes — to be a sound principle of law that where the legislature passes an act which cannot be operative as to some on its citizens against their will, and it asks their express written acceptance thereof offering an inducement therefor, nothing short of the most *expense* and implicit language will authorize it to change or repeal the act to effect those accepting its terms as required.

And, it is certain that a reference to a general law such as the act of 1856 made here will not do it.

Another reason why this tax may not be collected of these plaintiffs is, that they are national banks.

This is not a tax on the shares of their capital stock it is a tax on their franchises.

National banks are the instrumentalities of the General Government to provide a national currency.

To furnish the States to tax their franchises is to permit the States to destroy this agency of the Federal Government to accomplish the purposes of that Government.

McCullock *vs.* State of Maryland, 4 Wheat., 317.
Osburn *vs.* United States Bank, 9 Wheat., 739.

For these reasons the demurrers will be over-ruled.

And thereafter on the 31st day of January 1894 judgment was rendered in words and figures as follows, to-wit:—

46 *Judgment.*

FIRST NATIONAL BANK OF COVINGTON, KY., Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

The defendant declines to answer herein and on motion of plaintiff and defendant this cause is submitted for final judgment.

It is therefore adjudged that the defendant, The City of Covington, its officers and agents be and they are hereby forever enjoined and restrained from distraining or attempting to distrain any of the plaintiff's property for said tax claim of $14,892.43 in the petition herein set forth and from attempting to collect same or any part thereof and that the plaintiff recover of the defendants costs herein. To this judgment the defendant excepts and prays an appeal to the court of appeals which is granted.

Order.

And thereafter on the 2nd day of December 1895 mandate was filed in words and figures as follows, to-wit:—

Mandate.

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON. } #10447.

Came complainant and filed mandate of the court of appeals
47 which is as follows:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON, Appellant,
vs.
FIRST NATIONAL BANK OF COVINGTON, Appellee.

JUNE 1.

Appeal from a judgment of the Campbell circuit court.

The court being sufficiently advised it seems to them there is no error in the judgment herein, it is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

A copy.
Attest:

A. A. ADAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Issued October 10", 1895.

STATE OF KENTUCKY, }
Campbell County. }

I, A. L. Reuscher, clerk of the circuit court for the county and State aforesaid do hereby certify that the foregoing 25 pages of typewritten matter and this page contain a full and complete copy of the matters set out in the within styled action as the same appears of record and remains on file in my office.

Witness my hand as clerk and the seal of said court this 2nd day of July, 1900.

[SEAL.] A. L. REUSCHER, *Clerk.*

48 Exhibit "C" referred to in the foregoing bill of complaint was and is in words and figures following, to-wit:—

EXHIBIT "C."

Whereas, this the First National Bank of Covington, Ky., in 1893 instituted its action in the Kenton circuit court against the City of Covington, enjoining said city from collecting or attempting to collect any taxes from it or on its capital stock or any of its property other than its banking building, upon the ground that it had a contract with the State of Kentucky under the Hewitt law, whereby, by reason of its payment to said State of its taxes under said Hewitt law, it and its shares of stock were exempt from all other taxation, and said cause having been transferred to the Campbell circuit court, said court so adjudged and perpetually enjoined said City of Covington from asserting or from attempting in any way to collect any tax on the property of this bank or its shares of stock, except its banking building, and the City of Covington appealed from said decision to the court of appeals of Kentucky, and the said judgment of the said Campbell circuit court was by said court of appeals affirmed on June 1", 1895 (97 Kentucky page 590), said court of appeals holding that this bank had such irrevocable contract with the State of Kentucky under the Hewitt law; and

Whereas it has by the Supreme Court of the United States been held in the Bank Tax cases from Kentucky, October term, 1898, vol. 174, U. S. Supreme Court Reports, that—

"An adjudication that an irrevocable contract exists, which precluded the enforcement of a tax law in conflict with the contract, is *res judicata* as to an attempt to enforce such tax law in
49 succeeding years against the parties to such an adjudication."

And as this bank has continued up to the present and intends to so continue to pay its taxes to the State under said Hewitt law, the said City of Covington has no right to assess for taxation its shares of stock or any of its property other than its banking building, and this bank is in no way subject to the provisions of senate bill, No. 188 of the 1900 session of the Kentucky legislature, and its president and cashier are directed for these reasons not to list with the city assessor of Covington for taxation any of its shares of stock.

Exhibit "D" referred to in the foregoing bill of complaint was and is in words and figures as follows, to-wit:—

EXHIBIT "D."

COVINGTON, KY., *June* 20", 1900.

Mr. Frank P. Helm, president First national bank.

DEAR SIR: Under the late act passed by the last legislature of Kentucky, "in relation to the taxation of national banks," it is my duty to assess all shares of stock in national banks in this city.

You are hereby notified and directed to report to me on or before the 30th day of June, 1900, at my office. 153 Pike street,
50 Covington, Kentucky, and to list with me for taxation for municipal purposes all shares of stock in the First national bank, of which you are president, for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900.

JOHN N. MIDDENDORF,
City Assessor.

And on the same day, to wit, on June 23rd., A. D. 1900 subpœna in chancery was issued herein which was and is in words and figures following, to-wit:—

Subpœna in Chancery.

The President of the United States of America to the City of Covington, a municipal corporation, and John N. Middendorf, the assessor of the city of Covington, Greeting:

You are commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court hall, in the city of Covington, on the first Monday in September next, to answer a bill in equity exhibited against you in our said court by the First National Bank of Covington, Ky., a corporation, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Covington, this 23rd., day of July, A. D. 1900, and in the 125th year of our Independence.

JOS. C. FINNELL,
C. C. C., K. D.

51 [SEAL.]

MEMORANDUM.—The defendants to enter their appearance in the suit in the clerk's office, on or before the 3rd. day of September next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

JOS. C. FINNELL, *Clerk.*

And on the same day, to-wit, on July 23rd., A. D. 1900, a motion for injunction was filed. This motion cannot be found in the record, but there is in the record an acceptance of a notice of said motion, filed on July, 1900, which is as follows:—

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK
v.
CITY OF COVINGTON.

Notice of Application for a Temporary Injunction.

The defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington, are each hereby notified that the complainant will, upon Tuesday, the 31st. day of July, 1900, at 12.15 p. m. in chambers, at the Federal building, in the city of Louisville, Kentucky, apply to the Honorable Walter Evans, judge of the United States circuit court for the district of Kentucky, for a tem-
52 porary injunction in accordance with the prayer of the bill of complaint herein.

J. W. BRYAN,
Solicitor for Complainant.

Service of the above notice accepted for the defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington.

F. J. HANLON,
Solicitor for said Defendants.

Return on Subpœna.

And on a day following, to-wit: on July 27th, A. D. 1900, the subpœna in chancery issued herein on the 23rd day of July, A. D. 1900 was returned to the clerk's office of said court with the marshal's proceedings thereon endorsed in words and figures following, to-wit:—

"I hereby certify that I received this writ on the 23rd of July, 1900, and that I have personally served the same, on the 24th day of July, 1900, upon the said defendants, The City of Covington, by delivering to W. A. Johnson, its mayor, a true copy of the within, and upon John N. Middendorf, assessor of the city of Covington, by delivering to him a true copy of the within on the 25th day of July, 1900. This, therefore, returned executed as the law directs this 23rd day of July, 1900.

A. D. JAMES, *U. S. M.*,
By J. D. COMPTON, *D. M.*

53 And on a day following, to-wit, on August 14th. A. D. 1900 an entry was made herein which was and is in words and figures following, to-wit:—

Entry Journal "H," page 660.

This day came the plaintiff, by J. W. Bryan, its counsel, and, with leave of the court, filed its amended bill of complaint herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any of its shareholders until the further order of the court. Pending said motion the defendants came, by F. J. Hanlon, W. H. Julian and Harvey Myers, their counsel, and, with leave of the court tendered and filed a plea to the jurisdiction of the court of this action, and, with leave of the court, were also permitted now to file a demurrer to the bill of complaint, as amended, but neither said plea nor said demurrer was set down for argument; and the said motion of the complainant for the temporary injunction aforesaid coming on to be heard was argued by counsel, and the court, being sufficiently advised, delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March, 21, 1900, and the said defendants, until the further order of the court herein, are also
54 restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law and to what extent.

Service of this order shall be made upon the defendants by delivering to each of them a copy hereof.

And on the same day, to-wit: on August 14th, A. D. 1900 an amended bill of complaint was filed herein which was and is in words and figures following, to-wit:—

Amended Bill of Complaint.

The Circuit Court of the United States for the District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
vs.
THE CITY OF COVINGTON ET AL., Defendants. } In Equity.

The complainant, by leave of court first had and obtained, amends its bill of complaint herein as follows, to-wit:—

Your orator says that by mistake it was stated in its original bill that during years 1893, 1894, 1895, 1896 and up to
55 first of July 1897, its capital stock was five hundred thousand ($500,000.) dollars, when the amount of its capital stock during said period was six hundred thousand ($600,000.) dollars.

Your orator says that said act of the legislature of Kentucky of March 21", 1900, set forth in its original bill herein, is invalid and void and obnoxious to and inconsistent with the provisions of section 5219 of the Revised Statutes of the United States. Said act of March 21, 1900, is not in conformity with said section 5219 of the Revised Statutes aforesaid in that the said act by section two thereof undertakes to make complainant, and other national banks in the State of Kentucky, liable for the taxes to be assessed against and collected upon the shares of stock thereof; and by section three of said act, it is undertaken to authorize and empower the defendant, City of Covington, and said defendant has the right, power and authority thereunder to assess the shares of stock of this complainant for all the years from 1893 to the present year 1900, both inclusive, as well as in the future, and to make complainant liable for said taxes, notwithstanding the fact that complainant, as in its original bill set forth, has regularly paid its taxes as by its said contract agreed, and in accordance with the provisions of the Hewitt law, each and every of said years, to the State of Kentucky, and notwithstanding the fact that the capital stock of complainant was decreased from six hundred thousand ($600,000.00) dollars, to three hundred thousand ($300,000.00) dollars upon the first day of July 1897, and complainant paid one hundred ($100.00) dollars upon each share of said reduction of three hundred thousand ($300,000.00) dollars, to the owners of the said shares of stock of complainant at said time; and that complainant hath regularly during each and every of said years, semi-annually, paid to its then shareholders, its current earn-
56 ings and profits by way of dividends; and notwithstanding the fact that many of the shares of stock of complainant have changed ownership during said years, and in many instances during said time holders and owners of its shares of stock have died and their said stock has been distributed among their heirs or

legatees, and in other instances sold and the proceeds applied to the payment of the debts of its said shareholders; and during said years many of its shareholders were non-residents of the State of Kentucky, who in many instances have sold and transferred their shares of stock during said time; all of which statements complainant avers to be true. During said years there was no law in the State of Kentucky providing for the assessment of its shares of stock or any law authorizing municipal taxation thereof.

Your orator further complaining showeth unto your honor that said act of March 21, 1900, undertakes to and does discriminate against complainant and other national banks in the State of Kentucky, and deprives them of the equal protection of the laws, for that, it says that there is not now, and has not been during any of said years, any statute or law in Kentucky under which the shares of stock in State banks are to be assessed or taxes collected thereon, as is attempted to be done upon shares of stock in national banks located in Kentucky, by said act. And your orator further shows that the only general law in the State of Kentucky, under which the State banks are assessed for taxation, is the revenue law of 1892, the provisions of which are set forth in its original bill herein, under which said State banks are assessed for and pay a franchise tax, the amount thereof being ascertained by the said State board of valuation and assessment, as in its original bill set forth. Your
57 orator says that the legislature of Kentucky by an act approved March 19, 1898 (Session Acts 1898, page 96, of the General Assembly of the Commonwealth of Kentucky), provided that the franchise of all banks, State and national, in cities of the first and second class, should be assessed for taxation for city purposes, by such city officer as made the assessment for taxation in said cities. That is, that act conferred upon such cities the power of assessment given by the revenue law of 1892 to the State board of valuation and assessment. And your orator further shows that the legislature of Kentucky by an act which became a law upon March 23, 1900, without the signature of the governor (Session Acts, page 89) amended said act of 1898, by which amendment it was undertaken to authorize the assessment for taxation by cities of the first, second and third class in Kentucky, of the shares of stock in every incorporated bank located in said cities, while the said act of March 21, 1900, under which the defendant, City of Covington, is attempting to proceed against complainant provides for the assessment for taxation of the shares of stock of all national banks in the State of Kentucky wheresoever located, being entitled "An act relating to "taxation of the shares of stock of national banks," and while the shares of stock in State banks assessed only in cities of the first, second and third class in said State. And your orator says that there are many State banks located in and doing business in the State of Kentucky outside of cities of the first, second and third class.

Wherefore, your orator says that said act of March 21st, 1900 is not in conformity with, but is contrary to the laws of the United States relating to national banks, and is a discrimination against

complainant, and other national banks located in the State of Kentucky. And complainant further says that said act is in-
58 valid, illegal and void, and contrary to the provisions of the Constitution of the United States in that it is an attempted impairment of the obligations of the contract between complainant and the State of Kentucky, and an attempted taking of the property of complainant without due process of law, and a taking of the private property of complainant and its shareholders for public use without just compensation, which is in violation of the provisions of articles V. and XIV. of the amendments to the Constitution of the United States, and an attempt to enforce said act of March 21, 1900, would be an abridgment of its privileges and immunities and a denial to it of the equal protection of the laws, and in violation of article XIV. of the amendments to the Constitution of the United States.

And your orator files herewith as part of this and its original bill, as evidence in this case, a certified copy of all the orders, the judgment and opinion and holding by the court of appeals of Kentucky upon the said appeal by the defendant herein, City of Covington against complainant, referred to in complainant's original bill, and marks said copy Exhibit "X."

Wherefore, your orator prays your honor to grant unto it the injunction asked in its original bill restraining and enjoining the said City of Covington and all of its officers from in any way assessing or attempting to assess for taxation by said city the shares of stock of complainant, or any of them or to hold complainant liable for the taxes thereon for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900, or any of said years, or for any future year or years; and prays that it be adjudged that the contract entered into by and between it and the State of Kentucky, whereby its shares of stock and all of its property, other than its banking building and real estate, are exempt from any taxation by the defendant City of Cov-
59 ington, for and during its corporate existence, was an irrevocable one, and that such contract is irrevocable is *res judicata;* that said act of the legislature of Kentucky of March 21, 1900, be declared illegal, null and void, in whole and in part; that it may have judgment for its costs. It prays as in its original bill, and for any and all other and further relief that to it in equity and good conscience belongeth in the premises.

J. W. BRYAN,
Solicitor for the Complainant.

UNITED STATES OF AMERICA, }
State of Kentucky, County of Kenton, } ss:

Frank P. Helm makes oath that he is the president of The First National Bank of Covington, Ky., complainant herein, and that the statements made in the foregoing amended bill of complainant as of his own knowledge are true, and those on information he believes to be true.

FRANK P. HELM.

Sworn to and subscribed before me by Frank P. Helm on the 9th day of August, 1900.

R. K. TARVIN,
[SEAL.] *Notary Public, Kenton Co., Ky.*

My commission expires January 8th, 1902.

And on the same day, to-wit, on August 14th., A. D. 1900, Exhibit "X" referred to in the foregoing bill of complaint was filed herein which was and is in words and figures following to-wit —

60 EXHIBIT "X."

Pleas before the honorable court of appeals of Kentucky, at the Capitol, in Frankfort.

At a court of appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 25th day of October, A. D. 1894, the following order was entered herein:

Order.

CITY OF COVINGTON
vs.
FIRST NATIONAL BANK OF COVINGTON. } Campbell.

Ordered that the foregoing causes be continued for oral argument.

Afterwards, to-wit, on the 5th day of March, A. D. 1895, the following order was made herein and in consolidated causes:
By agreement of all the parties and on their motion, it is ordered that these 17 causes be heard together and said causes coming on to be heard were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties and cities and laid over until tomorrow for further hearing.

Afterwards, to-wit, on March 6th, A. D. 1895, the following order was entered herein and in the consolidated causes:—

61 *Order.*

These causes again coming on to be heard were argued by D. W. Lindsey for the bank and Wm. McD. Shaw and Hugh Rodman for the counties and cities and laid over for further hearing on to morrow.

Afterwards, to-wit, on March 7th, 1895, the following order was entered herein and in the consolidated causes:

These causes again coming on to be heard were argued by Wm. Goebel for the banks and H. C. Barker for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, to-wit, on the 8th. day of March, A. D. 1895, the following order was made herein and in the cases consolidated with it:

Order.

These causes again coming on to be heard were argued by John W. Rodman and T. L. Edelen for the banks and laid over for further hearing on tomorrow.

Afterwards, to-wit, on the 9th day of March, A. D. 1895, the following order was entered herein, and in the cases consolidated herewith:

Order.

These causes again coming on to be heard were argued by James P. Helm for the banks and laid over for further hearing on next Tuesday.

62 Afterwards, to wit: on the 12th day of March, A. D. 1895, the following order was entered herein and in the causes consolidated herewith:

Order.

These causes again coming on to be heard were argued by W. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid on the 1st day of June, A. D. 1895, the following judgment was entered:

Judgment.

CITY OF COVINGTON, Appellant, vs. FIRST NATIONAL BANK OF COVINGTON, Appellee.	Appeal from Campbell Circuit Court.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein. It is therefore, considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended. Judges Lewis, Paynter and Guffy dissenting.

The following is a copy of the opinion delivered by the court through Chief Justice Pryor on the 1st day of June, 1895.

63 *Opinion.*

The Bank of Kentucky, the Northern bank, the Farmers bank and other State banks, the National Bank of Covington and other national banks are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxation for county and municipal purposes, and others standing as appellees in cases relieving them from such local burdens.

The legislature imposing such burdens is found in the Kentucky statutes under the title of revenue and taxation, and is based on secs. 174 and 175 of the present constitution.

Section 174 provides:

"All property whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Section 175 provides:

"The power to tax property shall not be surrendered or suspended, by any contract or grant to which the Commonwealth shall be a party."

It is manifest by reason of section 175 the right of the legislature no longer exists of surrendering the power to tax property, or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging to corporations or individuals, must pay the same rate of taxation.

The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State, by which, in con-
64 sideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger State tax than individuals paid, or their charters required, the State agreed not to impose upon them any local burdens, and the important inquiry in these cases is: Was such a contract entered into between the banks and the State based on a consideration, binding the State on one side and the banks on the other?

The statute under which this contract is claimed to have been made is found in the general statutes under the title of revenue and taxation, secs. 1 and 4 or art. 2, and known as the Hewitt bill. Counsel for the banks in the discussion of these cases classified the banks as follows:

1. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law.

2. Banks chartered after that date, when by a general law the right to amend or repeal the charter was expressly reserved.

3. The national banks.

We shall treat all the cases as one in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation, and requiring them to pay a larger tax to the State upon its property than that paid by the individual tax-payer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation and made all taxation alike upon property, whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is im-
65 posed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed, and like institutions in more favored localities, where lighter or no local burden exists, and while the fact that the banks in the commercial centers of the State are taxed two and a quarter dollars on the hundred, under the pres- system (local and State), and those in an adjoining town or county only one per cent., may work a hardship, and prevent competition, or drive the banks thus heavily taxed to locate elsewhere, yet this, under the old system, was a question of policy only, and the framers of the present constitution, in adopting the *ad valorem* system, left no room for classifying property, so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act and that of the banks in accepting it.

It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856), with reference to taxation, and the circumstances attending the legislation resulting in the passage of the Hewitt bill, in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation, and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contracts by which only a tax of fifty cents on each share of one hundred dollars of stock could be imposed.

The national banks claimed they were entitled to be taxed like the State banks, and were not liable for local burdens, and, besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government.

The State claimed the old banks were taxed for too small an

amount, and the banks chartered since the year 1856 were
66 resisting any discrimination between such institutions and the old banks. Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all banks, State and national, we will impose a tax of seventy-five cents on each share of your capital stock equal to one hundred dollars, and in addition a tax on your surplus, and this shall be in full of all tax, State, county and municipal, provided you will accept the act imposing the tax with the conditions annexed.

This act reads:

"Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay *one* each one hundred dollars or so much of their surplus, undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The seventh section of the act further providing that: "Nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and minicipal purposes as other real estate is taxed."

67 Section 4 of this act provides:

"That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders at a regular meeting thereof, may give its consent to the levying of said tax, *and agree* to pay the same as herein provided, *and to waive and release all right under the act of Congress*, or under the charters of the State banks, to a different mode *or smaller rate of taxation, which consent or agreement with the State of Kentucky* shall be evidenced by writing under the seal of such bank, and delivered to the governor of this Commonwealth, *and upon such agreement and consent being delivered and in consideration thereof*, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid, during the corporate existence of such bank."

Section 5 of this act provides:

"The said banks may take the proceedings authorized by sec. 4 of this act, at any time, until the meeting of the next General Assembly: Provided, they pay the tax provided in sec. 1, from the passage of the act."

Section 6 provides:—

"This act shall be subject to the provisions of section 8, chapter 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptance with the governor under their corporate seals. The banks incorporated before the act of 1856 surrendered what they claimed to be their
68 charter contracts, by which they were taxed only fifty cents on their shares of stock of one hundred dollars. The national banks yielded their right to deduct from the value of their stock their surplus consisting of non-taxable securities, and their claims to be taxed as the old banks, and most of the State banks uniting to prevent any discrimination, all accepting the proposition made by this State, and agreeing to pay seventy-five cents on each share of stock of one hundred dollars in value, and the additional tax mentioned in the article.

It is conceded by counsel for the City of Louisville (and we think it clear) that prior to the passage of the Hewitt bill, in the year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of one hundred dollars, and the same may be said of all the banks chartered prior to the act of 1856; but it is further contended that the act, as well as the contract under it, were both subject to repeal by reason of the reserved power contained in section 6 of art. 2. Again it is contended by counsel for the City of Frankfort that the grant to the banks was without any consideration, and the renewals of the charter of the old banks, as they are designated, placed them within the provisions of the act of 1856, and by the attorney general that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court, in the case of the Franklin County Court *v.* Bank of Kentucky, reported in 87 Ky., 370, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant, and if disposal to reconsider the decision rendered in that case, it could not effect the issue involved on the present appeals.
69 At the date of the passage of the Hewitt bill the Franklin circuit court had declared that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill that court affirmed that judgment. It is apparent that art. 2 in the Hewitt bill was adopted by the legislature with a view of equalizing the burdens of taxation as between the banks and to relieve them from the burden of local taxation during their corporate existence, but it is insisted there was no consideration for this partial exemption.

*I*t there was a binding contract between the *old banks* and the State to pay a tax of only fifty cents on each share of stock, and these banks surrendered their contract, or their right under it, and agreed to pay seventy-five cents to the State instead of forty-two and one half-cents, it seems to us this would be a wise consideration, sufficient to uphold any such contract with the State, if the power existed with the State to make it, and the fact that such a power existed has been too often decided by this court, as well as the

Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights, not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in the commercial centers of the State and those outside of such localities, while no heavy burdens for local taxes were being levied, and, therefore, the consideration moving from the old banks was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discrimination between these monied institutions and, therefore, its exactions from
70 the old banks and the national banks acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856, as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute, imposing the tax of seventy-five cents and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks, and with such a consideration as will uphold it, no reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into, the provisions of the present constitution, and subsequent legislation under it, operated to repeal not only the statute, but the contract made by virtue of its provisions, and this power existed by reason of the sixth section of the article, making it subject to the provisions of sec. 8, chap. 68, General Statutes, declaring that this,

"Shall be subject to amendment or repeal as the will of the legislature, unless a contrary intent be plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, and as we think was the legislative intent, the word *act* in section 2 of the Hewitt bill was used as synonymous with the word *article*, and, therefore, the reservation of the power on the part of the legislature was the right to amend or repeal the article in which is contained the proposition by the State to the banks, in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act, and the right to annul by repeal or
71 otherwise a contract made under it, is manifest, and while under our present constitution the State can make no contract, by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous decisions of the Supreme Court.

The general rule in regard to legislation is, that one legislative body can not bind a subsequent legislature to its action in purely

legislative matters. but when it comes to matters of contract, if the State has the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution providing that "no State shall * * * pass any law impairing the obligation of contracts." (Section 10, art. 1, U. S. Const.)

That the State may enter into such contracts was held by this court as early as the year 1839, in the case of Johnson *v.* Commonwealth, reported in 7 Dana, 342, where there was an effort to tax the shares of stock in a bank, in excess of the terms of the contract, and this court held that the contract placed a limitation on the power.

In the case of the Farmers' Bank *v.* Commonwealth, reported in 6 Bush., 127, it was held the bank could not be taxed beyond
72 its charter rate, as fixed by the contract, and in the late case of The City of Frankfort *v.* The Bank of Kentucky, and others, reported in 87 Ky., 370, the same doctrine was announced.

The question then arises—Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature, or the framers of the constitution, to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties. The legislature, at the time this contract was made, recognized the right of the Bank of Kentucky, and the banks chartered prior to 1856, to stand upon their charter rights, or if not the right of the banks as against the State on this subject of taxation had found its way to the courts, and had been decided adversely to the State. The legislature thought the tax of fifty cents too small. The old banks claimed an irrevocable contract. The national banks could only be taxed as authorized by the Federal Congress. The new State banks were subject to such taxation as the State might see proper to place upon them, and to make them liable for these local burdens would be to end their existence, or cause them to seek shelter under the Federal banking act, and with a view of placing the entire matter at rest, and placing the banks on an equal footing, the legislature said to all of the banks:

"If you will agree to pay seventy-five cents on each share of stock equal to one hundred dollars, etc., it shall be in full of all tax, State, county and municipal."

It said to the old banks:

73 "You must relinquish your right to a smaller rate of tax, and this must be done, not by your president and directors, but by the consent of the stockholders, in writing, and delivered to the governor as evidence of your good faith."

The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution, the contract was adhered to by both the State and the banks. It is now argued the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights and agreed to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business at the head of these institutions would relinquish every right they had acquired under their charters, that an increased burden might be placed upon the banks they represented.

In the contention that the sixth section of the article reserves this power of repeal, counsel overlook the fact, that by the express terms of the section by which this reserved power is retained, it is provided that "*no amendment* or repeal shall impair other rights previously vested." The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself connected with its acceptance by the banks, vested in the latter rights of which they could not be divested without their consent, the chief of which was the payment of a specified tax to the State during their corporate existence,

The State waived its right to tax these banks for local pur-
74 poses (except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way the State granting the franchise derived the benefit instead of the municipal government, while under the present system, the difference between forty-two and one-half cents and seventy-five cents, with tax or surplus amounting to one hundred and twenty-five thousand dollars, is taken from the revenue proper, and applied to the municipalities where the banks are located.

In the case of Commissioners of Sinking Fund *v.* Green & Barren River Navigation Company, reported in 78 Ky. 73, this court *had*, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and that the repeal of the charter to the extent it deprives the company of its contract rights acquired under it was in violation of the constitution. In that case the court said:

"We can not assent to the doctrine that will allow the State to alter or abolish such contracts, whenever, in the opinion of the legislature, the necessities of the public or the interest of the State require it."

The case of The Commonwealth *v.* Owensboro &c. R. Co., 95 Ky., 60, determines in effect the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroads, and in doing so relieved them from taxation for a limited period. The act provided:

"That all railroads which may hereafter be built within this Commonwealth under existing charters, or under charters which may

hereafter be granted, shall be exempt from all taxation under
75 the laws of this Commonwealth for the period of five years, from the date of the beginning of the construction of the new roads."

The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes, when the five years from the beginning of the construction of these roads had not expired.

The court, in response to the argument to exact the tax, and the application of the act of 1856 to its provisions, said:—

"It is sufficient to say of this proposition, which even at first blush strikes us as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State, and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law and affected all alike who accepted its provisions or acted on the strength of them."

Counsel for the local governments argue the questions involved as if there was a perpetual grant to these corporations, and, therefore, the power of repeal must of necessity have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence the policy of the State, if viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

76 The framers of the constitution in adopting that instrument were not looking to past legislation on this particular subject, but were creating an original law for the future welfare of the State, leaving the rights of those protected by either the State or Federal constitutions undisturbed, and if the attempt to repeal vested rights had been made, the framers of the present constitution would have been as powerless to accomplish such a purpose as the legislature in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the court of appeals of New Jersey, in the case of New Jersey *v.* Yard, reported in 95 U. S. 110, by an act of the legislature, passed in March, 1865, the legislature of New Jersey enacted that the Morris & Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amount to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open, and in use to Philipsburg, and annually thereafter, *which tax shall be in lieu and satisfaction of all other taxation and imposition whatever, by or under the contracts of this State.*

The twentieth section of the original act of incorporation reserved to the legislature the right to alter, amend or repeal the act when-

ever it should think proper. The act of 1865 was an amendment to the original grant and in regulating the amount of taxation contained this proviso:

"*Provided*, That this section shall not go into effect, or be binding on the company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent thereto, which
77 assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller in delivering the opinion in that case said: "The main question here is, did the legislature intend to make such a contract," and held that "its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States." And in like manner will the contract in question be upheld.

And, as said by Mr. Justice Miller in New Jersey *v.* Yard:

"The legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within sixty days, else it became wholly inoperative."

And it may be said in the New Jersey case there was no consideration other than is found in ordinary railroad charters.

It is said, however, in that case, the repealing clause, or what is known in this State as the act of 1856, was appended to the original charter, and when amended it formed no part of the amendment, as is found in this case, and, therefore, the court concluded the amendment was not subject to repeal.

The question is asked, why the necessity of making the act of 1856 apply to article 2, if the legislature did not intend to reserve the right of annulling the contract? In response to this it might be asked, if such was the legislative intent, why the necessity of having a formal written acceptance from the banks surren-
78 dering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the hundred dollars, so long as their charters continued, if the power was reserved of abrogating the contract at any moment. If such was the legislative purpose there could have been no necessity for any consideration moving from the banks, or any formality attending the execution of the contract.

The act of 1856 was enacted to avoid the effect of the decision of the Supreme Court in the Dartmouth College case, reported in 4 Wheat., 518, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the legislature, without such a reservation, but under this act of 1856, it has been held by this court, as well as every other court having the question before it, that property rights or contract rights, acquired by virtue of the charter in exercising the privileges conferred, could not be interferred with by legislation, and, in fact, the act expressly provides "that whilst privileges and franchises so

granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contract rights sustained by the adjudications of the courts of the State that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill. (City National Bank of Paducah *v.* The City of Paducah, 10 Ky. L. R. 221; Covington City National Bank *v.* City of Covington, 21 Fed. Rep., 484.)

The legislature saw the obstacle in the way of increasing the taxation on these banks, and the national banks, standing on
79 the same footing with the State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks, that equality as between them might exist, and, at the same time increase the taxation. The banks had not asked for any amendments to their charters, nor was the effort made by the legislature to repeal or amend the charters. The State was attempting to enact a general law, entitled revenue and taxation, applying to all subjects of taxation, and to all kinds of property. The tax in regard to banks, under this general title, was fixed at seventy-five cents as to all banks, *and as to all corporations*, required by law to be taxed on their capital stock, and as to the old banks and the national banks, the surrender of these rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the Hewitt bill, and be released from other taxation, so long as their charters continued.

Why, then, did the legislature annex to *article 2*, of the revenue bill, the provisions of the act of 1856? No contract had been made when the bil- passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consum-ated. It was provided in article 2 that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition, if, within the period fixed, there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privileges granted was not involved in the legislation, but the banks, with their charters in full force, were asked by the legislature to make an agreement as to a rate of taxation, that could not have otherwise been enforced against either the old banks or the national banks.

80 The corporations had the right to contract by reason of their charters, and, dealing at arm's length with the State, accepted the terms and conditions offered in good faith, and the question here is, not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract without the consent of the banks.

The right of the State to repeal the franchise, or amend the charter, is not here questioned, when subject to the act of 1856, but the repudiation of a contract will not be sanctioned.

There was, in fact, necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not; and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side, and the State on the other, by which the taxation on these banks might be increased, and, at the same time, placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856, but neither the banks nor the State ever intended to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed, and no meaning given a statute that will lead to an absurdity.

81 The case before us is much stronger for the banks than that of New Jersey *v.* Yard. Here, the old banks had contract rights sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation, and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there were any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article, the intention of the legislature, it seems to us, is manifest. This increased tax, under the former constitution, as before stated, went to the State, and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms, so as to withdraw from the State treasury this additional tax the banks have been paying amounting to $125,000 annually, and transfer it to the cities to aid in discharging local burdens.

It requires no judicial utterance to show that, under the national banking act, where the rate of interest is fixed at six per cent. (or as the State law provides), and forfeiture of the entire interest if more is charged, that these banks by the imposition of local burdens, can not be taxed as much as two and one-half per cent. in any locality, when the average taxation of State banks will not exceed half that sum.

In the case of Lionberger *v.* Rouse, reported in 9 Wall., 468, after the national banking system went into effect, the legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks, and two of them declined to do so.

82 The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent., and the State was powerless to increase this tax. The assessment of the plaintiff's shares of stock in the national bank was at the rate of nearly two per cent. It was

contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said, as the national bank, or its shares, was not taxed for a greater sum than other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere.

While there are exceeding sixty State banks, the Bank of Kentucky and its branches, the Northern bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches were, at the time of the passage of the Hewitt bill, and are now, regarded as the prominent banking institutions of the State, and if, with their capital and business rank placed before the Supreme Court with a tax of only one per cent. and the tax on the national banks placed at two per cent., the judgment of the Supreme Court upon such a state of fact, doubtless, would have been similar to the decision of the court in the case of The National Bank *v.* The City of Paducah, 10 Ky. L. R. 221.

The case of Lionberger *v.* Rouse, 9 Wall. 468 has no bearing on this question of contract. Here the State was not powerless to remedy the evil, or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however, great, or even insig-
83 nificant, the difference in taxation might have been. The national banks recognizing the fact they could be taxed as other moneyed capital, and desiring uniformity of taxation, and not one rate for one bank, and a different rate for another, surrendered their right, or claim, to be taxed as the old banks were taxed, and entered into this agreement by which a uniform system of taxation was adopted for all banks, such as the State desired.

The claim of the old banks and the national banks, as to the mode of taxing them, was, certainly, not without foundation, for the reasons already given, and the proposition by the legislature to settle these differences, and its acceptance, was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank cases. In the one case there was no legislation making the discrimination, while in the case before us, the State, after placing the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the contract, is now insisting upon a legislative re-cission of the contract, and placing the old banks at least in a position where they are to pay only fifty cents on the shares of a hundred dollars, and leaving the national banks subject to a greater rate of taxation.

This repeal, if sustained, is in effect, the creation of three or more new banks with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks, with a capital of five millions, at the time the
84 Hewitt bill passed, will be relegated to the condition they were — when the contract was made, as was held by the Supreme Court in the case of The Water Company *v.* Clark, reported in 143 U. S. 1, and that *an exemption* from local burdens, with a tax of one-half of one per cent. to the State. The national banks, with a capital of ten millions when the Hewitt bill was enacted, and now increased to twenty millions will also be exempt from local burdens, because the State, in the exercise of the power it now claims, had abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination, when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities (or the legislature for them) without power to impose on national banks local burdens.

The banks have all, practically, accepted the provisions of the Hewitt law, and the legislation repealing or cancelling the contract, being in violation of both the State and Federal Constitutions, leaves the Hewitt bill, as to the banks, in full force, and they must be taxed under its provisions, until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and reality, eighty cents, or about that sum, on each share of stock of one hundred dollars, while the citizen tax-payer is paying only forty-two and one-half cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old constitution, or to the municipalities, under the new constitution.

In the absence of this contract it would go to discharge
85 local burdens, but with this contract in full force, it must be paid, as to the amount and manner, as provided by the Hewitt bill of 1886, into the treasury of the State.

It results, therefore, that the judgments in the case of The Louisville Banking Co. *v.* City of Louisville, Third National Bank *v.* City of Louisville, Northern Bank of Kentucky *v.* Bourbon County, Deposit Bank *v.* Franklin County, Bank of Kentucky *v.* Armstrong, Bank of Kentucky *v.* City of Frankfort, Farmers Bank *v.* City of Frankfort, Same *v.* Franklin County, and Same *v.* City of Henderson are reversed; and The City of Louisville *v.* Bank of Kentucky, Commonwealth *v.* State National Bank, Same *v.* Frankfort National Bank, Same *v.* Deposit Bank, Same *v.* Bank of Kentucky, City of Covington *v.* German National Bank, Same *v.* First National Bank, and Commonwealth *v.* Farmers Bank are each and all affirmed.

COMMONWEALTH OF KENTUCKY:

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the foregoing twenty five pages and this page, contain true and complete copies of all the orders and judgment and the opinion of said court of appeals in the case of City of Covington,

appellant, against First National Bank of Covington, appellee, lately pending in said court, as the same appears of record in my office.

Witness my hand and seal this 31st day of July, 1900.

SAMUEL J. SHACKELFORD, *Clerk*,
[SEAL.] By ROBERT L. GREEN, *D. C.*

86 And, on the same day, to-wit, on August 14", A. D. 1900 defendant's plea was filed herein which was and is in words and figures following, to-wit:

(*Defendant's Plea.*)

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY,
v.
THE CITY OF COVINGTON, KENTUCKY, &C. } In Equity.

The joint and several plea of The City of Covington and John N. Middendorf, assessor of said city, to the bill of complaint of the First National Bank of Covington, Kentucky.

These defendants (by protestation, not confessing any of the matters in said bill contained to be true in manner and form as the same are therein set forth, do plead thereunto; and) for cause of plea say, that heretofore, to-wit, on the day said complainant exhibited its present bill of complaint in this honorable court and before and continuously since then it was and is a resident of the district of Kentucky, and that both defendants to said bill are and were residents of said district,

Wherefore, defendants say this court has not jurisdiction of this cause of action, nor of them, the defendants.

F. J. HANLON,
87 HARVEY MYERS,
Solicitors for Defendants.

W. H. JULIAN, *Counsel.*

Defendant's Demurrer.

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Complainant,
v.
THE CITY OF COVINGTON, KENTUCKY, &c., Defendants. } In Equity.

The joint and several demurrer of The City of Covington, Kentucky, and John N. Middendorf, assessor of said city, defendants, to the bill of complaint of the First National Bank of Covington, Kentucky.

These defendants say they are advised that there is good cause of demurrer to said bill; and they do demur accordingly and for cause of demurrer say that said bill contains no matter of equity whereon this court can ground any decree, or give complainant any relief as against these defendants.

Wherefore, these defendants do demur thereto, and crave judgment of the court, whether they shall make answer to said bill otherwise than as aforesaid.

And they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

88

W. H. JULIAN,
F. J. HANLON,
HARVEY MYERS,
Solicitors for Defendants.

I hereby certify, as counsel for defendants in the foregoing demurrer that, in my opinion, the same is well founded in point of law, and proper to be filed.

F. J. HANLON.

The defendant, John N. Middendorf, makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

JOHN N. MIDDENDORF.

Subscribed and sworn to before me by said John N. Middendorf, this 30th day of July, 1900.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

My commission expires March 4", 1902.

And on the same day, to-wit, on August 14th, an opinion was filed herein which was and is in words and figures following, to-wit:

Opinion.

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON
v.
CITY OF COVINGTON ET AL.

The complainant brings this action to enjoin the City of
89 Covington and its officers from assessing and collecting for municipal purposes the taxation on its shares of capital stock, provided for in the act of the General Assembly of Kentucky approved March 21st, 1900, entitled "An act relating to the taxation of shares of stock of national banks" which is as follows:

"Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three, is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said articles in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore, be it enacted by the General Assembly of the Commonwealth of Kentucky:—

SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SEC. 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the banks to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

90 SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: Provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and nine-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this

act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after
91 its *its* passage."

To clearly understand the scope of this very important controversy it is necessary to say that in 1886, in an effort to remedy the confusion growing out of certain unrepealable provisions in the charters of the older banks in regard to taxes, the legislature passed what is commonly called the Hewitt act, the pertinent provisions of which are as follows:—

"SECTION 1. The shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof, equal to $100., or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, State, county and municipal.

* * * * * * *

SECTION 4. That each of said banks, institutions and corporations by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its
92 shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks."

This rate of taxation, all the avails of which went to the State, was higher than that paid by other property, but on that account the banks were exempt from local taxation. In 1892 the legislature enacted what is now section 4077 of the Kentucky Statutes, as follows:

"SECTION 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, telegraph company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman
93 of said board, and shall convene the same from time to time as the business of the board may require."

Section 4078 prescribed the manner of ascertaining the value of the franchises to be assessed. As a basis for this assessment banks, under section 4092, were required to make reports, on the first day of March of each year, of their condition the preceding 31st day of December, and to pay the tax on July 1st following. This subsequent legislation was intended to repeal and in express terms did repeal the Hewitt law. After the enactment of the legislation last referred to, the complainant, in November 1893 instituted an action in the State court to enjoin the levy for that year as against it of the taxation thereby provided for, and in its petition averred that long before the enactment of this legislation it had accepted the provisions of the Hewitt act within the time named therein; that it had up to that date paid the taxes provided for by the terms of the Hewitt act as accepted by complainant, and in due form sought the judgment of the State court upon its claim that the Hewitt act and its acceptance thereof constituted an irrevocable contract between the complainant and the State of Kentucky which the legi-lation of 1892 would impair. The court in which the action was brought, in 1894, distinctly adjudged that this contention was well founded, and that the provisions of the Hewitt act and their acceptance by the

complainant did constitute an irrevocable contract between the State and this bank, and further, that the legislation of 1892 was void as to the complainant as impairing that contract. This decision of the court of appeals of Kentucky, affirming that judgment being in favor of the right claimed under the Constitution of the United States could not be appealed to the Supreme Court of the United States.

The bill of complaint, as amended, in the case before us, insists not only that the question of taxation between the complainant and the State of Kentucky, including the municipality of Coving-
94 ton up to 1904, is conclusively settled and adjudged by the court of appeals upon the basis referred to, but that the act of March 21 1900, is also unconstitutional, first, in its attempt by section 3 to authorize the levy of taxation upon the complainant for the years previous to March 21, 1900, and also, second, because the taxation provided for by the said act discriminates against national banks, and levies upon the shares of national banks a greater rate of taxation than is levied upon other moneyed capital, and particularly upon capital invested in State banks and denies them the equal protection of the law.

As clearly established by many decisions, and particularly by that announced in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S. 664, all State laws providing for the taxation of shares of national banks must be subject to the provisions of section 5219 of the Revised Statutes of the United States, which is in this language:

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The Supreme Court, in the case last referred to, held that
95 section 4077 of the Kentucky statutes, so far as it affects national banks, is void, because it is in conflict with that section. The Hewitt law having been repealed in 1892, and section 4077 of the Kentucky statutes being void as to national banks, there was no State statute in force for taxing the shares of the latter for municipal purposes until the act of March 21st, 1900, was passed. The third section of that act is now assailed upon the ground that it undertakes to tax those shares retroactively and illegally.

The court will not attempt to decide that there may not, in extreme cases, be a legitimate statutory enactment imposing a retro-

active taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case, and one which would come extremely near to taking property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. If the power to do this exist at all there is no limit to it, and it might illustrate the subject to consider the result if church property now exempt should, as it lawfully might, be made subject to taxation in the future, and not only be, but retroactively for ten, or twenty, or even fifty years back. Here would be a practical confiscation of such property for public use. Nor does the court mean to deny that where the law in fact imposes taxation upon property, which, however, is overlooked by the assessor, or otherwise omitted from the assessment, or some other step is taken which is faulty, the defects may not be cured by legislation. That curative legislation is admissible in such cases is a well established doctrine of the courts, but there was no legislation—valid legislation—for taxing national bank shares as such before March
96 21, 1900, and the act of that date was not passed to validate defective steps taken to levy a lawful tax, but it is legislation which imposes an altogether new tax upon a new subject. Any attempt to give it the appearance of being a curative statute is merely nominal and colorable, and cannot be effective. The previous legislation had been void because it was opposed to section 5219, Revised Statutes, and could not be cured, though other new and different legislation might be enacted. Moreover, it imposes a tax upon national bank shares alone, and the retroactive feature of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the State for the retroactive taxation of moneyed capital in the hands of State banks or of individuals. Other banks paid, and now pay, only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon State banks, but a tax the rate of which is the same as that upon "real estate," which rate might not comply with section 5219 of the Revised Statutes, unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the Supreme Court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax. At all events, for the reasons indicated, it seems to the court to be very clear that section 3 of the act conflicts with the requirements of section 5219, because there is nowhere any corresponding retroactive imposition on State bank shares, and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on State banks by the franchise tax. And, besides, as the bill shows, the State has collected and received from the complainant in this case the high taxes imposed under the Hewitt law up to the
97 current year. There is no way to sue the State of Kentucky in her courts to compel it to refund the tax thus paid. Nor is there any way to compel the State to make an adjustment of such

payments in the collection of the taxes under section 3 of the act of 1900, although it is therein vaguely provided that credit shall be given, but our laws afford no way authoritatively to make the provision effective. No officer is charged with the duty or given the power to make it so. Until the State in this case refunded the taxes wrongfully collected (if it should so turn out) under the Hewitt act, or shall provide some adequate way for doing *do*, it must be content with the taxation levied in the way provided by its own legislation, at least so long as it retains the money. Otherwise there would be a double taxation. Certainly the State must not, in attempts to correct its legislation upon the subject of taxation, discriminate against national bank shares in such a way as to violate section 5219. So long as the State retains the taxes collected under the Hewitt law from this national bank it is a manifest discrimination against it to again retroactively tax its shares for the same years without taxing also in the same way the State banks. We may sum up this phase of the case by saying that it may, in the abstract, be legally possible to pass a valid retroactive tax law, yet in the concrete case before us it was not done, the attempted legislation for the reasons indicated being in conflict with section 5219.

As the present holders of the complainant's shares may be very different persons from those who held them in previous years; as the present holders may have purchased under the previously existing law, and as their rights and interest would be injurious- affected by large payments for retroactive taxation, at least one phase of what has been said is well supported by the reasoning of the
98 opinion of the court of appeals in Bellevue *v.* Peacock, 89 Ky. 495. When the town of Bellevue made a contract with certain persons to improve a street, it was supposed by all parties that the law empowered the town to impose the cost upon the abutting property, and the contract so required. The court of appeals however, decided that the town had no such power. Subsequently the legislature passed an act attempting to validate the contract and to impose the necessary taxation retrospectively upon the property. In a suit to test the question the court in the opinion referred to held the act unconstitutional largely upon the ground that as there was no law to so burden the property at the time the improvements were made, the legislature could not subsequently impose it. The complainant and its shareholders in the case before us stand in substantially the same position as did the owners of the abutting property in the Bellevue case in respect to previous judicial decisions and otherwise. There was no law until the act of 1900 imposing any such liability as it attempted to create, and at least unless a similar burden is imposed upon other moneyed capital the retroactive liability cannot be imposed upon national banks.

Coming now to the question of whether the whole act of March 1900, is void as being in conflict with section 5219 of the Revised Statutes, it must be borne in mind that this may be manifested in either of two forms, first, it may appear on the face of the State law itself, as in the statute of 1892, pronounced invalid by the Supreme

Court in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S., or, second, it may come in the manner of enforcing the State law, or in the manner of operating under it, as in cases like People *vs.* Weaver, 100, U. S. 539, and Whitbeck *vs.* Mercantile National Bank, 127, U. S. 193.

It goes without saying that money invested in national bank shares should bear its ratable proportion of the public bur-
99 dens. Nothing in the legislation of Congress, nor in the decisions of the courts of the United States, in the slightest degree prevents this. All that is done is, under section 5219, to guard money so invested against any form of State taxation which puts it at a disadvantage as compared with money invested in State banks. The wisdom and necessity of this rule is obvious. The professed object of the act of 1900 is to make the taxation upon all banks equal. The operations of the act may possible in the future bring about such a result, though upon the fact of the statute it appears well nigh impossible. *Prima facie* a discrimination exists, the one being taxed on an entirely different basis or plan from the other. The State banks pay taxes upon a valuation of their franchises &c. and national banks upon the valuation of their shares in the hands of individual holders. By no intelligent system of valuation does it appear possible to value a franchise annually as high as all the property of the corporation as appears to be necessary in order to make the two modes of taxation agree. These cannot be equivalnet in law, and *prima facie* they appear not to be equivalent in fact, though possible this latter appearance may be overcome by proof. The City of Covington would, therefore, appear to be entitled to have an opportunity, if so desiring, to plead and prove that the result of the operation of the act of 1900 will not in fact discriminate in the next fiscal year against money invested in national bank shares, and after this opportunity is afforded the court can determine upon the evidence whether the actual results under the act conflict with section 5219, by imposing a greater rate of taxation upon money invested in national bank shares than upon that invested in State bank shares should there by any moneyed capital in said city so invested as to bring it within the rules adopted by the Supreme Court in construing section 5219.

In this particular case, however, the views so far expressed
100 may all become subordinate to the question most energetically urged that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the State to the effect that its shares shall only be taxed according to the proviosions of the Hewirr lawm and that this matter has been finally adjudicated by the courts of the State in the manner stated in the bill.

The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties, or those in privity with them, is certainly broad enough, as usually stated, to cover cases like this, if there are no exceptions to it. The case of New Orleans *vs.* Citizens' Bank, 167, U. S. 371, goes far towards closing

the question, and will do so unless its operation should be limited by considerations now to be stated. Of course as to the claim for taxes for the year named in the suit described in the bill of complaint, the judgment is absolutely conclusive, although in the light of later decisions palpably erroneous. Should its effect be limited to the taxes for the year named in that suit under the circumstances about to be stated is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law and the complainant's acceptance of its provisions constituted an irrevocable agreement between the bank and the State of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893, and only enjoined their collection. If did not in its language or scope embrance any others. It, however, as stated, went upon the general doctrine that there was a contract thus created between those parties which the Federal Constitution protected from any impairment. Bank Tax cases 97 Ky. 591. Within a year of so after this judgment was rendered, and from which no appeal could be taken to the Supreme Court of the United States for the reason al-
101 ready indicated, the court of appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation 39 S. W. Rep. 1030. It was then also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the State, and might be altered at its pleasure. In the case of The Citizen's Saving Bank, etc., *vs.* Owensboro, 173 U. S., 636, the Supreme Court sustained in the fullest manner the last view taken of the question by the court of appeals of Kentucky. So that we have here a claim to the benefit of the doctrine of *res adjudicata* as against the clearest decision that the judgment relied on was based upon a proposition, not of fact, but of constitutional law which has been utterly repudiated not only by the highest judicial tribunal in Kentucky which had announced it, but also by the Supreme Court of the United States itself. I have not found any decision upon the exact point, but I am greatly oppressed by the thought that common justice may demand such a relaxation of the general rule as to matters adjudicated as to limit its operation within very wide bounds, it is true, but still to such as will exclude a case precisely like this, so far at least as it affects taxation subsequent to the announcement of the final settlement of the constitutional doctrine. Otherwise much injustice and inequality cannot be avoided. It is possible that it was with a purpose and desire to consider this phase of the question when it should come up that the Supreme Court, in the Owensboro case, 173 U. S., at page 648, so explicitly withheld an expression of its opinion as to whether the principle of *res adjudicata* would apply to suits for taxes claimed as is here pleaded.

It may be that the authorities, which are very strong, will not

permit even such an exception to be grafted upon the general
102 rule, and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of New Orleans *vs.* Citizens' Bank, 167 U. S., for this court to leave it to a higher tribunal to say whether there should be any limitat-ons upon the general rule as to the conclusive effect of judgments as between the parties to the litigation. But, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration.

It has been suggested that before any injunction is granted, the complainant in such a case should pay the amount of taxes which is fairly due from it. This is a principle certainly in force where a valid law leaves no doubt that something is due. But if the claim of *res adjudicata* made by the complainant is maintainable, such payment in this case has already been made. And even if the principle could apply here at all, where the entire tax is contested, it can hardly be enforced until a final judgment has determined whether there is anything at all due from the complainant, and besides, there appears to be manifest equity in the bill so far as it seeks to enjoin the enforcement of section 3 of the act.

It is also insisted that for the case made by the bill there is an adequate remedy at law. The case of The Bank of Kentucky *vs.* Stone 88 Fed. Rep 383, is a sufficient authority to the contrary although that case was affirmed by a divided court (174 U. S. 799) And besides the relief sought as to section 3 of the act appears to be decisive of this question. It also seems to be settled upon the authority of Hills *vs.* Exchange Bank, 105 U. S. 319, and the cases there cited that the bank itself may sue in cases like this to protect the interest of its shareholders.

103 It follows that the complainant is entitled to an injunction *pendente lite* restraining the defendants and each of them, until the further order of the court, from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and also, until the further order of the court, restraining the defendants and each of them from collecting either from the complainant or from any of the holders of shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a rate higher than is permitted by section 5219, Revised Statutes, and if so, to what extent.

Counsel will prepare the proper orders.

WALTER EVANS, *Judge.*

August 14, 1900.

And on the same day, to-wit: on August 14th A. D. 1903, a temporary injunction was issued herein, which was and is in words and figures following, to-wit:—

104 *Temporary Injunction.*

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
v.
CITY OF COVINGTON ET AL., Defendants. } Order.

This day came complainant by J. W. Bryan, its counsel, and with leave of the court filed its amended bill of complaint herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any of its shareholders until the further order of the court. Pending said motion, the defendants came by F. J. Hanlon, W. H. Julian and Harvey Myers, their counsel, and with leave of the court tendered and filed a plea to the jurisdiction of the court of this action, and with like leave of the court were also permitted now to file a demurrer to the bill of complaint as amended, but neither said plea nor said demurrer was set down for argument. And the said motion of the complainant for the temporary injunction aforesaid coming on to be heard, was argued by counsel, and the court being sufficiently advised delivered an opinion in writing, which is ordered to be filed and pursuant thereto it is ordered, adjudged and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of com-
105 plainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent. Service of this order shall be made upon the defendants by delivery to each of them of a copy thereof.

August 14, 1900 WALTER EVANS, *Judge.*

Return.

Said temporary injunction was returned endorsed in words and figures following, to-wit:—

"I hereby certify that I received the within writ on the 15th day of August, 1900 and that I personally served the same this 15th day of August, 1900, upon the said defendants, The City of Covington by delivering to W. A. Johnson, its mayor, a true copy of this writ and John H. Middendorf, assessor for the city of Covington by delivering to him a true — of the within writ. This, therefore returned executed as the law directs this 15th day of August, 1900.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *D. M.*

106 And on a day following, to-wit, on December 17th, A. D. 1900 a motion was filed herein which was and is in words and figures following, to-wit:

Motion.

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON ET AL.

The complainant, The First National Bank of Covington, Ky., by J. W. Bryan, its counsel, moves that the injunction granted *pendente lite* herein be made permanent.

FIRST NATIONAL BANK OF COVINGTON, KY.,
By J. W. BRYAN, *Its Counsel.*

And, on the same day, to wit, on December 17th A. D. 1900 stipulation was filed herein which was and is in words and figures following, to-wit:

Stipulation.

United States Circuit Court, District of Kentucky, at Covington.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

107 It is hereby stipulated and agreed by and between the parties to this cause that they do now waive alike the setting

down for argument of the defendants' plea to the jurisdiction of the court and of their demurrer to the bill of complaint. It is also stipulated and agreed that if the court shall not sustain the said plea, and if it shall disallow and overrule the said demurrer, then that in that event the bill shall be taken for confessed, the defendants now saying that they do not desire to answer the said bill or further plead thereto, and that without waiting the thirty days required by the rules after a judgment *pro confesso* the cause may be sustained for final judgment, and the matter thereof and all pending motions be adjudged by the court.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
By J. W. BRYAN, *Its Counsel.*
F. J. HANLON,
Solicitor for Defendant, City of Covington.
HARVEY MYERS,
Counsel for Defendant.

108 And, on the same day, to-wit, on December 17th A. D. 1903 *en* entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 45.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

The parties came by their counsel, and the complainant in writing now filed, moved the court that the injunction granted *pendente lite* herein be made permanent and thereupon the parties filed a stipulation in writing, and pursuant thereto, this cause is now submitted for the judgment of the court upon said motion and also upon the plea of the defendants to the jurisdiction of the court and also upon their demurrer to the bill of complaint and if the said plea and said demurrer are both disallowed and over-ruled then the cause is submitted for the judgment of the court as upon a final hearing, the bill, by said agreement, being then to be taken for confessed and further delay thereon being waived by the consent of the parties.

And on the same day, to-wit, on December 17th A. D. 1900 judgment was entered herein which was and is in words and figures following, to-wit:—

Order Book "I," page 45.

109 THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

This cause came on to be further heard at this term, and was argued by counsel, and thereupon upon consideration thereof, and of the stipulation filed herein, it is ordered, adjudged and decreed as follows, namely:—

First. That the plea of the defendants to the jurisdiction of the court be and the same is disallowed and over-ruled.

Second. That the bill of complaint "as amended and to which the demurrer and plea were considered as applying is sufficient and contains matter of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor, for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make
110 any collection of taxes so assessed until the court shall have determined upon further pleadings and evidence herein, should the defendants elect to resent the same whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains contract of this cause for the purpose of adjudicating and settling any questions which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged and decreed that the complainant recover of the defendants its costs herein expended to be taxed by the clerk.

The complainant and defendants alike separately and each for himself excepts to the foregoing judgment.

And, on a day following, to-wit, on December 19, 1900 restraining order was issued herein which was and is in words and figures following, to-wit:

Restraining Order.

United States Circuit Court, District of Kentucky, at Covington.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

This cause came on to be further heard at this term, and
111 was argued by counsel, and thereupon upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged a-d decreed as follows, namely:

First. That the plea of the defendants to the jurisdiction of the court be and the same is disallowed and overruled.

Second. Tha- the bill of complaint is sufficient and contains matters of equity meet to be considered by the court and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise
upon any assessment made upon any of the shares of the
112 capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged and decreed that the complainant recover of the defendants its costs herein espended, to be taxed by the clerk.

The complainant and the defendants alike, separately and each for himself, excepts to the foregoing judgment.

WALTER EVANS, *Judge.*

December 17, 1900.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an order made and entered in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington, this 19th day of December, A. D. 1900.

[*Clerk.*] JOS. C. FINNELL, *Clerk.*

Return.

Said restraining order was returned endorsed in words and figures following, to-wit:—

I hereby certify that I received this writ on the 20th day of December 1900 and that I personally executed it by delivering to
W. A. Johnson, mayor of the city of Covington, a true copy
113 of the order, defendants, also to W. A. Johnson individual-, on the 20th day of December 1900 in Covington, Ky.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *Deputy.*

And, on a day following, to-wit, on January 7th, A. D. 1901 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 61.

The defendants, The City of Covington and John N. Middendorf the assessor of the city of Covington, considering themselves aggrieved by the judgment herein, on the 17th day of December 1900, come now and present to the court their petition for an appeal to the Supreme Court of the United States, together with an assignment of errors, asserted and intended to be urged in that behalf.

On consideration whereof the court now orders that on a bond as provided by law, being filed, in the penal sum of $500.00 to the acceptance of the clerk, the said appeal be allowed and it is ordered that a transcript of the record, proceedings and papers, upon which the judgment of this court was rendered in this cause duly authenticated, be sent to the Supreme Court of the United States, according to law in such case provided.

114 And, on the same day, to-wit, on January 7th A. D. 1901 petition for appeal was filed herein which was and is in words and figures following, to-wit:—

Petition for Appeal.

United States Circuit Court, District of Kentucky, at Covington, December Term, Monday, December 17th, 1900.

FIRST NATIONAL BANK, Complainant,
vs.
THE CITY OF COVINGTON & JOHN N. MIDDENDORF, the Assessor of the City of Covington, Defendants.

Before the Honorable Walter Evans, judge.

To the Honorable Judge Evans:

The above-named defendant-, City of Covington and John N. Middendorf, the assessor of the city of Covington conceiving themselves aggrieved by the order and decree made and entered in the above entitled cause on December 17, 1900, wherein and whereby it was ordered adjudged and decreed "that the said defendants and each of them, be enjoined and restrained from assessing for taxation any of the shares of stock in the complainant bank, either against complainant or any holder of its shares, or making any levy of
115 taxes upon any of said shares for any purpose, for any time or period, previous to March 21, 1900, and from collecting from complainant or any of its shareholders any taxes upon any of said shares of stock for any time subsequent to that date" said decree being final—to which decree the said defendants and complainant, and each of them, excepted at the time of the rendition thereof. The said defendant- City of Covington and John N. Middendorf, city assessor of the city of Covington, by their attorney now come and do hereby appeal from said order and decree of December 17, 1900, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein, and they and each of said defendants pray that this appeal may be allowed, and they pray for an order fixing the amount of the supercedeas bond which defendants shall give and furnish upon said appeal, and that a transcript of the record, papers, and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, to the end that said decree may be reversed and that said errors may be corrected, and so they will ever pray.

F. J. HANLON,
City Solicitor for the City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

And, on a day following, to-wit, on January 19th A. D. 1901, assignment of errors was filed herein which was and is in words and figures following, to-wit:—

116 United States Circuit Court, District of Kentucky, at Covington, December Term, Monday, December 17, 1900.

FIRST NATIONAL BANK, Complainant,
vs.
THE CITY OF COVINGTON & JOHN N. MIDDENDORF, the Assessor of the City of Covington, Respondents.

Before the Honorable Walter Evans, judge.

Assignment of Errors.

To the Honorable Judge Evans:

Comes now the defendants and each of them, and file the following assignment of errors upon which they and each of them will rely.

First. The court erred in overruling the defendants' plea to the jurisdiction of the court.

Second. The court erred in holding the bill of complaint as amended to which the plea and demurrer were considered as applying, sufficient and in overruling the demurrer of the defendants thereto.

117 Third. The court erred in enjoining and restraining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose, for any time, or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes either from the complainant bank or from any of the holders of the shares of the capital stock of said bank for any time, subsequent to that date.

Fourth. The court erred in retaining control of this cause for any purpose.

Fifth. The court — in decreeing costs herein, against defendant.

Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint.

In order that the foregoing assignment of errors may appear of record, the respondents and each of them, present the same to the court and pray that such disposition be made thereof, as in accordance with law, and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

F. J. HANLON,
City Solicitor for the City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

And, on a day following, to-wit, on January 18", A. D. 1901 bond on appeal was filed herein which was and is in words and figures following, to-wit:—

118 Circuit Court of the United States, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, Kentucky,
vs.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, *Assessor of the City of Covington.*
} Bond on Appeal.

Know all men by these presents that we The City of Covington and The American Bonding and Trust Company of Baltimore City are held and firmly bound unto The First National Bank of the City of Covington in the sum of five hundred dollars, to be paid to the said The First National Bank of the City of Covington Kentucky, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 17th day of January A. D. 1901

Whereas, the above named The City of Covington, Ky., and John N. Middendorf, assessor of said city of Covington, Ky., have prosecuted and appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the circuit court of the United States for the district of Kentucky, at Covington.

Now, therefore, the condition of this obligation is such that if the above named The City of Covington, Ky., and John N. Middendorf, assessor of the said city of Covington, Ky., shall prosecute this said appeal to effect and answer all costs, if they shall fail to
119 make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE AMERICAN BONDING COMPANY
OF BALTIMORE CITY,
[SEAL.] By BEN A. ADAMS, *Vice Pres.*
Attest: L. J. DROEGE, *Ass'nt S'c'y.*
THE CITY OF COVINGTON,
By W. A. JOHNSON, *Mayor.*

Sealed and delivered in the presence of
JOS. C. FINNELL, *Clerk.*

Approved January 18" A. D. 1901,

JOS. C. FINNELL,
Clerk U. S. Circuit Court, Kentucky Dist.

And, on a day following, to-wit, on June 3rd., A. *F.* 1902 motion to file mandate was filed herein which was and is in words and figures following, to-wit:—

Motion to File Mandate and Opinion and to Redocket.

FIRST NATIONAL BANK OF COVINGTON, a Corporation,
vs.
CITY OF COVINGTON, a Municipal Corporation, and JOHN N. MIDDENDORF, Assessor of the City of Covington.

Now comes the respondents herein, City of Covington, and John N. Middendorf, assessor of the city of Covington and move the
120 court for leave to file the mandate and opinion of the Supreme Court of the United States, of date, April 28th, 1902, and to re-docket this cause.

F. J. HANLON,
W. H. JULIAN,
Counsel for Respondents.

And, on a day following, to-wit, on June 3rd, A. D. 1902 motion to modify injunction was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation,
vs.
CITY OF COVINGTON, a Municipal Corporation, and JOHN N. Middendorf, Assessor of the City of Covington. } In Equity.

Now comes the respondents herein, The City of Covington, and John N. Middendorf, assessor of the city of Covington, and move the court to modify the injunction granted herein, in so far as it restrains and enjoins the defendants and each of them, from making any assessment of the shares of stock of complainant bank, for any time or period previous to March 21st, 1900.

F. J. HANLON,
W. H. JULIAN,
Counsel for Respondents.

And on the same day, to-wit, on June 3rd, A. D. 1902 an
121 entry was made herein which was and is in words and figures following, to wit:—

Order Book "I," page 474.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY,
vs.
CITY OF COVINGTON.

Upon motion of F. J. Hanlon, counsel for respondents, it is ordered that the mandate and opinion of the Supreme Court of the United States be filed and the mandate spread upon the minutes of this court, and it appearing from said mandate and opinion that the appeal to the Supreme Court of the United States was dismissed for want of jurisdiction, and it appearing further that said case was remanded to the circuit court of the United States for the eastern district of Kentucky it is further ordered upon motion of said F. J. Hanlon, counsel for respondents, that the said case now stands redocketed in this court, said mandate is as follows:

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the circuit court of the United States for the eastern district of Kentucky, Greeting:

Whereas, lately in the circuit court of the United States for the district of Kentucky in a case between The First National Bank of Covington, Kentucky, complainant, and The City of Covington and John N. Middendorf, assessor of the city of Covington, defendants, wherein the decree of the said circuit court, entered in said
122 cause on the 17th day of December, A. D. 1900 was in favor of the said complainant, The First National Bank of Covington, Kentucky, and against the said defendants, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeable to the act of Congress, in such a case made and provided fully and at large appears.

And, whereas, in the present term of October in the year of our Lord one thousand nine hundred and one the said cause came on to be heard before the said Supreme Court, on the said transcript of record and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that this appeal be, and the same is hereby dismissed for the want of jurisdiction. And it is further ordered that this cause be and the same is hereby remanded to the circuit court of the United States for the eastern district of Kentucky April 28th, 1902.

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 29th day of May in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

And, on the same day, to-wit, on June 3rd A. D. 1902 an opinion was filed herein which was and is in words and figures following, to-wit:

123 *Opinion.*

Supreme Court of the United States, October Term, 1901.

THE CITY OF COVINGTON, KENTUCKY, and John N. Middendorf, Assessor of the City of Covington, Appellants,
vs.
THE FIRST NATIONAL BANK OF COVINGTON, Kentucky.

No. 255. Appeal from the Circuit Court of the United States for the District of Kentucky.

(APRIL 28TH, 1902.)

On July 23rd, 1900, the appellee herein filed a bill seeking to enjoin the threatened assessment and collection by the defendants below (appellants here) of municipal taxes under the assumed authority of an act of the General Assembly of the State of Kentucky, approved March 21st, 1900, a copy of which is excerpted in the margin.*

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* "Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article, in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city or town and taxing district in which the bank is located.

"SECTION 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock

with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock."

"SECTION 3. When any of said shares of stock have not been listed for taxation for any of said purposes under
124 levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that when any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year of years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act,

"SECTION 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon."

"SECTION 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessment of real estate and collection of taxes thereon may be enforced."

"SECTION 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court."

"SECTION 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, and emergency exists, and this act shall take effect and be in force from and after its passage."

In substance, it was averred in the original bill and in an amendment thereto that the complainant was chartered on November 17th, 1884, for a term of twenty years; that in 1886, by the acceptance of the provisions of an act of the General Assembly of Kentucky, approved May 17th, 1886, known as the Hewitt act, a contract was entered into with the State of Kentucky, irrevocable during the existence of the charter of the bank, whereby the complainant became obligated to pay the State taxes upon the shares of its stock, surplus

and undivided profits at a designated rate, such taxes to be in
125 full of all other taxes (State, county or municipal) except thos- levied upon its real property; that complainant had regularly made the payments stipulated in said contract up to and including the payment due July 1, 1900; that the taxes thus paid much exceeded the regular taxes imposed by the State during said period upon the real and personal property; and that the fact of the existence of an irrevocable contract had been conclusively determined by the judgment and decree of the court of appeals of Kentucky in a litigation between the banks and the State and the City of Covington, growing out of an attempt to collect State and city taxes upon the franchise of the bank, under the authority of an act of the General Assembly of Kentucky, approved November 11, 1892. It was also averred that notwithstanding the foregoing the General Assembly of Kentucky enacted the statute of March 21, 1900, already referred to, and that the defendants were attempting, under the assumed authority of said act, to compel complainant to list for taxation its shares of stock, and that the defendants designed and intended to assess said shares and to collect municipal taxes thereon for the benefit of the city of Covington for the years 1893 to 1900, both inclusive.

At much length facts were detailed in the bill and amendment regarding a reduction of the capital stock of the complainant made in July, 1897, as to the regular payments of dividends to stockholders during the years for which the tax was sought to be assessed and collected and as to changes in the ownership of the stock during said period. The unconstitutionality of the statute and the illegality of the threatened proceedings thereunder were asserted upon various grounds.

The defendants filed a plea to the jurisdiction and also demurred for want of equity. A motion for a temporary injunction was heard and granted, the court embodying its views in an elaborate opinion. (103 Fed. Rep. 523.) The order for the temporary injunc-
126 tion concluded as follows:

"It is ordered, adjudged and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the tax- so assessed are at a higher rate than is permitted by law and to what extent."

The complainant thereupon moved that the injunction be made permanent, and by stipulation the cause was submitted to the court "upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint," it being agreed that "if the said plea and said demurrer are both disallowed and over-ruled, then the cause is submitted for the judgment of the court as upon a final hearing, the bill then to be taken for confessed, and further delay thereon being waived."

On December 17, 1900, the following decree was entered:

"This cause came on to be further heard at this term and
127 was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged and decreed as follows, namely:

"First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

"Second. That the bill of complaint, as amended and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

"Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either the complainant or any holder of its shares any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting either from the complainant or from any of the holders of the shares of the capital stock, any taxes upon any of said shares, upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleading and evidence herein, should the defendants elect to present same, whether the taxes so assessed are at a higher
128 rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

An application for the allowance of an appeal was filed by the City of Covington and Middendorf; and an assignment of errors was

also filed on behalf of said defendants, the grounds, as stated therein, being reproduced in the margin.*

"Come now the defendants and each of them and file the following assignment of errors, upon which they and each of them will rely:—

"First. The court erred in overruling the defendant's plea to the jurisdiction of the court.

"Second. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient and in overruling the demurrer of the defendant thereto."

"Third. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of the shares of the capital stock of said bank, for any time subsequent to that date.

"Fourth. The court erred in retaining control of
129 this cause for any purpose.

"Fifth. The court erred in decreeing costs herein against defendant.

"Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint."

An order allowing the appeal as prayed was made. No appeal was prayed by the complainant.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court.

It is apparent that the bill as amended sought by injunction to prevent the collection of taxes on the shares of stock of the bank for the year 1893 to 1900, both inclusive, and indeed it is obvious from the decree that the court considered the case also involved the question whether any other than the tax provided by the Hewitt act could be imposed upon the bank during the remainder of its corporate existence. The relief sought was based upon the following grounds:

1. There was a contract with the bank by which the taxes authorized by the act of 1900 could not be levied without impairing the obligation of such contract.

2. The existence of this contract and its binding efficacy was concluded by the thing adjudged.

3. The tax provided by the act of 1900 was discriminatory and repugnant to section 5219 of the Revised Statutes. Now, although

the circuit court enjoined the assessment and collection of
130 taxes for the years prior to March 21, 1900, it did so, not upon the consideration and determination of the questions of contract or *res adjudicata*, but solely upon the question of discrimination. So far, however, as respected any taxes subsequent to March 21, 1900, were concerned, they were not disposed of, for the decree expressly provided as follows:

"The defendants are at liberty to make assessment of and upon said shares for taxation for any proper time or period after March 21 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendant elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause, for the purpose of adjudicating and settling any of the shares of the capital stock of the complainant at any time between the entry of this judgment, and the expiration of the present and existing articles of incorporation of the complainant."

Whilst the decree on its face thus unambig-ously discloses that the court did not finally dispose of the entire controversy made by the pleadings, an inspection of the opinion of the court makes it perfectly clear that the court did not intend to and did not dispose of the entire controversy which was involved in the cause.

The only opinion pronounced was that rendered on the decision made upon the application for a preliminary injunction. Though
in that opinion some reference was made by the court to the
131 contentions of contract and *res adjudicata*, the court expressly declared that it would not make a "final expression on the question," but would leave that subject open for further consideration. And when the court came to render the decree which is appealed from, making the injunction permanent, although it in substance reiterated the provisions of the order allowing the preliminary injunction, it added thereto the fourth paragraph, expressly retaining the cause "for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant, at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

The court below, in effect, having reserved for future determination the right of the complainant below to enjoin the collection of a municipal tax for 1900, and subsequent years, this court obviously cannot decide that controversy. Matters within the pleadings having been left undetermined and the cause having been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered was not final. (McGourkey *v.* Toledo & O. C. R. Co., 156 U. S. 536, 545, 546, and cases cited.) As a necessary result this court cannot adjudicate upon the contention respecting that portion of the issue which was actually determined by the circuit court, because a decree of a circuit court

upon the merits can be reviewed here only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause. The case is not to be brought here in fragments by successive appeals. (Southern Railway Co. *v.* Postal Telegraph Co., 179 U. S. 641, 644, and cases cited.)

Appeal dismissed.

True copy.
Test:

____ ____,
Clerk Supreme Court U. S.

132 And, on a day following, to-wit, on July 7th, A. D. 1902 an answer was filed herein which was and is in words and figures following, to-wit:—

Answer.

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation,
vs.
THE CITY OF COVINGTON, a Municipal Corporation, and JOHN N. Middendorf, Assessor of the City of Covington.

Without waiving either their demurrer or plea to the jurisdiction heretofore filed herein, but relying on same, the defendants, City of Covington, and John N. Middendorf, for answer herein, say: They deny that the Hewitt law set forth in the bill of complaint herein, now constituted, or ever constituted, an irrevocable contract between the complainant and the State of Kentucky, and allege that the same was repealed by the act of November 11th, 1892, referred to in said bill. They further allege that said Hewitt law never *nah* any effect or operation as between the complainant, or any other national bank, and the State of Kentucky, the same being unconstitutional and void in so far as it applied to national banks.

They deny that, either the Campbell circuit court or the 133 Kentucky court of appeals ever adjudged the said Hewitt law to be an irrevocable contract between the complainant and said State, and deny that the defendants are now estopped by any judgment of either of said courts from proceeding to assess the shares of stock in complainant under the act of March 21st., 1900, set forth in the bill of complaint herein. The judgment of the Campbell circuit court, affirmed by court of appeals relied on by complainant, as an estoppel herein, was in a suit to enjoin the taxation of the franchise of complainant, and did not necessarily involve any question of contract.

As to any change of ownership of shares of stock in complainant, or the death or non-residency of the owners thereof, the defendants have no knowledge or information sufficient to form a belief, and

therefore deny that there has been any change of ownership of any of the shares of stock in complainant during the years in controversy, and ask that complainant be required to disclose all the facts in regard thereto.

The defendants deny that, during all or any of the years in controversy, (1893 to 1902), there was no law in Kentucky provising for the assessment of complainant's shares of stock, and deny that there was during said time, no law of Kentucky authorizing municipal taxation thereof, and allege that, during all the said years, the shares of stock, in national banks were subject to taxation in Kentucky, for all purposes, State and local.

They deny that the said act of March 21st., 1900, is inconsistent with section 5219 of the Revised Statutes of the United States, or discrimination against the shares of stock in national banks, or is unconstitutional, or invalid in any respect.

Further answering, the defendants say, they do not propose to assess said shares, or to collect taxes thereon, otherwise than as authorized and provided for by section 5319, Revised Statutes of the
134 United States, and the said act of March 21st., 1900.

The assessments and rates of taxation proposed are as follows:

1893	$2.07 on each $100. on a valuation of $600 000.
1894	2.09½ on each $100. on a valuation of $600 000.
1895	2.00 on each $100. on a valuation of $600 000.
1896	2.00 on each $100. on a valuation of $600 000.
1897	2.00 on each $100. on a valuation of $600 000.
1898	1.75 on each $100. on a valuation of $300 000.
1899	1.75 on each $100. on a valuation of $300 000.
1900	1.90 on each $100. on a valuation of $300 000.
1901	2.00 on each $100. on a valuation of $325 000.
1902	1.84½ on each $100. on a valuation of $205 000.

The above valuations are the par values of the said shares, with the surplus of the bank added thereto and the assessed valuation of the real estate of said bank for each of said years, deducted therefrom, leaving the valuation as above set out; and the same are far below the market value thereof. The defendants say that the board of equalization for the year 1902 assessed the shares of stock of said bank at two-thirds of their par value, plus the surplus, and from said amount said board deducted the assessed valuation of the real estate of said bank, leaving the valuation of said shares of stock for the year 1902 at two hundred and five thousand ($205000.) dollars, and that the same is far below the market value thereof.

The above rates of taxation are the same as those imposed upon all other property of the city, not exempted by section 170 of the State constitution.

The defendants have assessed the real estate of said bank
135 for each of said years respectively, but the assessed valuation of same has been deducted from the assessed valuation of the stock as aforesaid, and is not taken into consideration in arriving at

the assessed valuation of the stock of said bank for said year or any of said years.

As to any taxes which complainant may have paid the State or any person claiming to act for the State, under the Hewitt law, after the same had been repealed, any such payment was unauthorized and contrary to law. Besides, the said act of 1900 provides for reimbursement of the bank, in the event of any such payment.

As to any distribution of stock among stockholders in 1897 (referred to in bill of complaint), at the time of any such distribution, the City of Covington held a superior lien upon any and all such shares for the amounts of taxes now claimed thereon, which lien attached at the date of each annual levy, and could not and cannot "be defeated by gift, devise, sale, alienation, or any means whatever." Any such distribution was made with knowledge, both actual and constructive, of said superior lien in favor of the city, on the part of the complainant and the stockholders therein. Both the complainant and the stockholders therein are now estopped from denying their knowledge of the city's said superior lien, and are also estopped from relying upon any such distribution as a ground for injunction herein.

Having fully answered, the defendants pray, that the bill of complaint herein be dismissed. They pray for their costs herein expended, and for such other relief as the equity of the case may require.

F. J. HANLON,
City Solicitor,
W. H. JULIAN,
HARVEY MYERS,
Att'ys for Defendants.

136 I hereby certify that the foregoing pleas set forth in the above answer are well founded in point of law.

F. J. HANLON,
City Solicitor.

DISTRICT OF KENTUCKY, }
County of Kenton. }

W. A. Johnson, mayor of the city of Covington, and John N. Middendorf, city assessor of the city of Covington, say they are two of the above named defendants and that the foregoing pleas are true in point of fact, and are not interposed for delay.

W. A. JOHNSON.
JOHN N. MIDDENDORF.

Subscribed and sworn to before me by said John N. Middendorf and W. A. Johnson, this 5th day of July, 1902.

R. J. BEIMFORDE,
N. P., K. C., Ky.

And, on a day following, to-wit, on July 15th A. D. 1902 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "I," page 511.

This day came the complainant and moved the court to set aside the filing of the answer of defendants, filed in the clerk's office at July rules. Argument was heard on said motion and the
137 court not being fully advised takes time with leave to both sides to file briefs.

And, on the same day, to-wit, on July 15th, A. D. 1902, motion was filed herein which was and is in words and figures following, to-wit:

Motion.

In the Circuit Court of the United States for the Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, Assessor of the Said City of Covington, Defendants.

Motion by the complainant to set aside the filing and take from the files answer of defendants. Filed on July 7th, 1902.

Now comes complainant, First National Bank of Covington, Ky., by its counsel, James W. Bryan, and moves the court to set aside the filing of, and take from the files, the answer of defendants, City of Covington and John N. Middendorf, assessor of said city of Cov-
ington, to the bill of complaint herein and amendment to
138 said bill, filed in the clerk's office herein, on July 7th, 1902, upon the following grounds, to-wit:

First. Said answer was filed without leave of court so to do.

Second. Said answer was filed too late, the defendant's plea to the jurisdiction of this court, and their demurrer to the bill of complaint herein and the amendment thereto, were on December 17th, 1900, by the court disallowed and overruled, and the said defendants failed to answer upon the next or any succeeding rule day thereafter, or until July 7th, 1902.

Third. That by stipulation in writing signed by the parties to this action, by their respective counsel, heretofore filed, to-wit, on December 17th, 1900, the said defendants advised this court that they did not desire to answer the bill of complaint herein, or to plead further thereto, and refused so to do.

Fourth. Said answer puts in issue in this action matters fully and finally determined by the judgment rendered herein on December

17th, 1900, to-wit: the right of said defendants, or either of them, to make any assessment or levy of any taxes upon the shares of the capital stock of this complainant against it or any of its shareholders, for any purpose, for any time or period previous to March 21, 1900, which judgment has never been set aside or modified or reversed, and is still in full force and effect.

Fifth. Said answer is evasive and not responsive to the allegations of the bill of complaint and not in accordance with the order of the court entered herein on December 17th, 1900, permitting the said defendants, should they elect — to do, to present further pleadings or evidence upon which this court should determine the right of said defendant to collect any taxes upon this complainant's
139 shares of stock for any time or period subsequent to March 21st, 1900, which they were permitted to assess and whether the taxes so assessed were at a higher rate than was permitted by law and to what extent, which judgment and order has never been set aside or modified or reversed, and still is in full force and effect.

JAMES W. BRYAN,
Solicitor for Complainant.

I hereby certify, as counsel for complainant in the foregoing motion that, in my opinion, the same is well founded in point of law, and proper to be filed.

J. W. BRYAN,
Solicitor for Complainant.

Frank P. Helm, president of complainant, makes oath that the foregoing motion is not interposed for delay of the cause in which it is filed.

FRANK P. HELM.

Sworn to and subscribed before me this 14th day of July 1902.

W. A. PRICE,
Notary Public, Kenton Co., Ky.

My commission expires January 25th, 1904.

And, on a day following, to-wit, on October 7th. A. D. 1902 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 561.

THE FIRST NATIONAL BANK, &c., }
v.
THE CITY OF COVINGTON ET AL. }

140 This cause coming on to be heard upon motion of respondent to modify the injunction heretofore granted herein, the court now being fully advised overruled said motion, to which ruling respondents by their attorney comes and excepts.

Coming on further to be heard *on* complainant's motion to set aside the filing and take from the files the answer of defendants, filed herein on July 7th., 1902, the court being advised sustains said motion, to which ruling of the court, defendants by counsel come and except*s*.

And, on a day following, to-wit, on October 15th., A. D. 1902 a motion was filed herein which was and is in words and figures following, to-wit :—

Motion.

United States Circuit Court, Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
CITY OF COVINGTON ET AL., Defendants.

Defendants move the court to re-consider the order entered herein on October 7th., 1902, sustaining the motion "to strike the answer of defendants from the files," and to re-consider the same.

W. H. JULIAN &
F. J. HANLON,
Attorneys for Defendants

141 And, on a day following, to-wit, on January 3rd, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "I," page 613.

This day came the defendants, The City of Covington and John N. Middendorf, assessor, and move the court that the interlocutory decree entered herein on *on* December 17th, 1900 be set aside for the purpose only of allowing the defendant- to answer and that the defendants be now allowed to file herein the answer this day tendered and offered to be filed.

Came the complainant and objected to the granting of said motion. Whereupon argument was heard and the court now being fully advised overrules said motion and refuses to allow said answer, so tendered, to be filed, to which ruling of the court defendants by counsel come and except.

And, on a day following, to-wit, on January 6th, A. D. 1903 motion was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON ET AL., Defendants.

Motion to set aside the interlocutory decree entered herein on December 17, 1900, and to file answer.

142 The defendants, The City of Covington, and John N. Middendorf, assessor, move the court: that the interlocutory decree entered herein on December 17th, 1900, be set aside, for the purpose only of allowing the defendants to answer, and that the defendants be now allowed to file herein, the answer this day tendered and offered to be filed.

F. J. HANLON,
W. H. JULIAN,
For Defendants.

And, on the same day, to-wit, on January 6th, A. D. 1903 answer was tendered herein which was and is in words and figures following, towit:

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation, Complainant,
v.
THE CITY OF COVINGTON, ETC., Defendants, Respondents.

Answer.

Without waiving either their demurrer or plea to the jurisdiction heretofore filed herein, but relying on same, the defendants, City of Covington and John N. Middendorf, for answer herein say: They deny that the Hewitt law set forth in the bill of complaint herein, now constituted, or ever constituted, an irrevocable contract between the complainant and the State of Kentucky, and allege that the same was repealed by the act of November 11th, 1892, referred to in said bill. They further allege that said Hewitt law never
143 had any effect or operation as between the complainant, or any other national bank, and the State of Kentucky, the same being unconstitutional and void in so far as it applied to national banks.

They deny that, either the Campbell circuit court or the Kentucky court of appeals ever adjudged the said Hewitt law to be an irrevocable contract between the complainant and said State, and deny that the defendants are now estopped by any judgment of either of

said courts from proceeding to assess the shares of stock in complainant under the act of March 21st., 1900, set forth in the bill of complaint herein. The judgment of the Campbell circuit court, affirmed by court of appeals relied on by complainant, as an estoppel herein, was in a suit to enjoin the taxation of the franchise of complainant, and did not necessarily involve any question of contract.

As to any change of ownership of shares of stock in complainant, or the death or non-residency of the owners thereof, the defendants have no knowledge or information sufficient to form a belief, and therefore deny that there has been any change or ownership of any of the shares of stock in complainant during the years in controversy, and ask that complainant be required to disclose all the facts in regard thereto.

The defendants deny that, during all or any of the years in controversy, (1893 to 1902) there was no law in Kentucky providing for the assessment of complainant's shares of stock, and deny that there was, during same time, no law in Kentucky authorizing municipal taxation thereof, and allege that, during all the said years, the shares of stock in national banks were subject to taxation in Kentucky, for all purposes, State and local.

They deny that the said act of March 21st., 1900, is inconsistent with section 5219 of the Revised Statutes of the United States, or discriminates against the shares of stock in national banks,
144 or is unconstitutional, or invalid in any respect.

Further answering, the defendants say, they do not propose to assess said shares, or to collect taxes thereon, otherwise than as authorized and provided for by section 5219, Revised Statutes of the United States and the said act of March 21st., 1900.

The assessments and rates of taxation proposed are as follows:—

1893 $2.07 on each $100. on a valuation of $600 000.
1894 2.09½ on each $100. on a valuation of $600 000.
1895 2.00 on each $100. on a valuation of $600 000.
1896 2.00 on each $100. on a valuation of $600 000.
1897 2.00 on each $100. on a valuation of $600 000.
1898 1.75 on each $100. on a valuation of $600 000.
1899 1.75 on each $100. on a valuation of $300 000.
1900 1.90 on each $100. on a valuation of 300 000.
1901 2.00 on each $100. on a valuation of $300 000.
1902 1.84½ on each $100. on a valuation of $205 000.

The above valuations are the par values of the said shares with the surplus of the bank added thereto, and the assessed valuation of the real estate of said bank for each of said years, deducted therefrom, leaving the valuation as above set out; and the same are far below the market value thereof. The defendants say that the board of equalization for the year 1902 assessed the shares of stock of said bank at two-thirds of their par value, plus the surplus and from said amount said board deducted the assessed valuation of the real estate of said bank, leaving the valuation of said shares of stock for the year 1902 at two hundred and five thousand ($205 000.) dollars, and that the same is far below the market value thereof.

The above rates of taxation are the same as those imposed upon all other property of the city not exempted by section 170 of the State constitution.

145 The defendants have assessed the real estate of said bank for each of said years respectively, but the assessed valuation of same has been deducted from the assessed valuation of the stock as aforesaid, and is not taken into consideration in arriving at the assessed valuation of the stock of said bank for said year or any of said years.

As to any taxes which complainant may have paid the State or any person claiming to act for the State, under the Hewitt law after the same had been repealed, any such payment was unauthorized and contrary to law. Besides, the said act of 1900 provides for reimbursement of the bank, in the event of any such payment.

As to any distribution of stock among stockholders in 1897 (referred to in bill of complaint at the time of any such distribution, the city of Covington held a superior lien upon any and all such shares for the amounts of taxes now claimed thereon, which lien attached at the date of each annual levy, and could not and cannot "be defeated by gift, devise, sale, alienation, or any means whatever." Any such distribution was made with knowledge, both actual and constructive, of said superior lien in favor of the city, on the part of the complainant and the stockholders therein. Both the complainant and the stockholders therein are now estopped from denying their knowledge of the city's said superior lien, and are also estopped from relying upon any such distribution as a ground for injunction herein.

Having fully answered, the defendants pray that the bill of complaint herein be dismissed. They pray for their costs herein expended, and for such other relief as the equity of the case may require.

F. J. HANLON,
City Solicitor,
W. H. JULIAN,
HARVEY MYERS,
For Defendants.

146 I hereby certify that the foregoing pleas set forth in the above answer are well founded in point of law.

F. J. HANLON,
City Solicitor.

DISTRICT OF KENTUCKY, }
County of Kenton. }

W. A. Johnson, mayor of the city of Covington, and John N. Middendorf, city assessor of the city of Covington, say they are two of the above named defendants and that the foregoing pleas are true in point of fact, and are not interposed for delay.

W. A. JOHNSON.

Subscribed and sworn to before me by said John N. Middendorf and W. A. Johnson, this 5th day of January, 1903.

F. J. HANLON,
N. P., K. Co., Ky.

And, on the same day, to-wit, on January 6th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 613.

This cause coming on to be heard upon the motion of the defendants to set aside the order of October 7th, 1902, striking from the files the answer heretofore filed herein and to reconsider same—argument was heard upon said motion and the court now being fully advised overrules the same, to which ruling of the court, defendants except.

147 And, on the same day, towit, on January 6th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "I," page 613.

This cause coming on to be heard generally upon the pleadings and the evidence, came the attorneys for the parties and made argument before the court upon all the questions arising in the case. The court not now being fully advised of the judgment it is proper to render herein, takes time, and said cause is generally submitted for judgment.

And, on a day following, to-wit, on May 19th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "J," page 78.

This day the court having fully considered the matter herein and being now fully advised files its written opinion herein:

And, on the same day, to-wit, on May 19th, A. D. 1903 opinion mentioned in the foregoing entry was filed herein which was and is in words and figures following, to-wit:—

148 United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Complainant,
v.
THE CITY OF COVINGTON ET AL., Defendants. } # 2195. Opinion.

The Supreme Court of the United States, upon the appeal from the decree entered herein December 17", 1900, held that said decree was

not final, but interlocutory and hence not appealable (186 U. S. 270). It did so because the decree did not dispose of the entire controversy presented by the pleadings herein. That controversy involves the right of the defendant, City of Covington, under the act of March 21", 1900, to collect from complainant any taxes whatever, *i. e.* taxes for the years after that date until the expiration of its charter, November 17", 1904, as well as taxes for the years prior thereto since the adoption of the revenue law of 1892. A single ground is urged by complainant for non-liability on its part for taxes under said act for any period of time either before or after its passage. That ground is that in a former suit brought by it against said defendant in the circuit court of Kenton county, Ky., afterwards transferred to the circuit court of Campbell county and appealed to the court of appeals of Kentucky to enjoin the collection of city taxes from it for the year 1893 under said revenue law of 1892, it was adjudged by the two latter courts that it had an irrevocable contract with the State of Kentucky under the Hewitt law of 1886 by which it was exempted until the expiration of its charter, November 17", 1904, from all
149 other taxes than that provided by said law and, because thereof, it was not liable for city taxes for said year 1893 under said revenue law of 1892. The opinion of the court of appeals rendered in said case is contained in 97 Ky., p —. An additional ground is urged for non-liability on complainant's part to defendant for taxes under said act of March 21", 1900, prior to its passage and that is that said act, in so far as it relates to taxes for that period of time, is discriminatory and repugnant to section 5219 U. S. Revised Statutes. Judge Evans held that said portion of said act was invalid on this ground and because of this enjoined and restrained the defendants from assessing complainant's property under said act for said years. This is all the farther the decree goes. He did not determine whether complainant was liable for no taxes at all on the ground relied on by it in support of its contention that it was not and hence the decree leaves the controversy as to taxes after March 21", 1900 undisposed of.

The decree not being final but interlocutory for the reason stated, I have the power to set it aside if I think that it is wrong and see fit to do so. But it is one thing for me to have such power and another for it to be proper for me to exercise that power. The decree was entered by Judge Evans after due consideration of the questions involved. I am of equal rank with him and have no appellate jurisdiction over his action. Comity requires, therefore, that I should permit it to stand so far as it goes. In allowing it to stand on this ground I do not mean to intimate any doubt as to the correctness of the position upon which he based it. I have simply refrained from any consideration of it, being under no necessity to do so.
150 It is incumbent upon me, however, to dispose of so much of the controversy as relates to the taxes after March 21", 1900, which has been left undisposed of by Judge Evens. The liability of complainant for these taxes depends entirely upon the correctness of the position taken by it that it was not liable for any

taxes under said act either before or after its passage because of the adjudication hereinbefore referred to, and, if well taken it affords an additional reason for permitting Judge Evans' action to stand.

It is certain that if I am free to determine the question whether complainant by its acceptance of the Hewitt law in 1886 acquired an irrevocable contract from the State of Kentucky exempting it from all other taxation than that provided in said law until the expiration of its charter, on its merits I would have to hold that it did not thereby acquire such a contract.

Bank Tax cases, 102 Ky. 174.
Citizens' Saving Bank *v.* Owensboro 173 U. S. 630.

And complainant so concedes. Its sole reliance is on the adjudication in the former suit. It claims that the question as to whether it so acquired such a contract is *res judicata*—a thing adjudged—and that it cannot now be claimed that it did not.

It is certain that in said suit it was adjudged by the Campbell circuit court and afterwards on appeal by the court of appeals that such a contract had been made by the State of Kentucky with complainant and that it was irrevocable. Both courts delivered written opinions and both opinions are made part of complainant's bill. It is true that the Campbell circuit court also adjudged that the
151 taxes levied by the Revenue Law of 1892 upon national banks were franchise taxes and hence invalid and that on this ground as well as the existence of the contract complainant was not liable for the taxes of 1893. But the latter was the main ground of its action and such was the only ground upon which the court of appeals based the affirmation of its judgment.

The defendants urge several reasons why the former adjudication should not be accepted in this suit as conclusive of the existence of such an irrevocable contract in complainant's favor. They say that this suit is upon an entirely different cause of action. It is a suit to enjoin the collection of taxes for subsequent years authorized to be collected by another and subsequent act of the legislature. This is undoubtedly true. But does this fact make any difference? I think not. It is well settled that a thing adjudged in a former suit cannot be questioned in a subsequent suit between the same parties although the latter is upon an entirely different cause of action. In the case of

Southern Pac. Ry. Co. *v.* U. S. 168 U. S. 45

Mr. Justice Harlan said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies be taken as conclusively

established, so long as the judgment in the first suit remains
152 unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined."

This principle has been applied by the Supreme Court of the United States in cases where the two suits related to different years taxes.

City of New Orleans *v.* Citizens Bank of La. 167 U. S. 371
Baldwin *v.* Maryland 179 U. S. 220

In the former case Mr. Justice White points out that "the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore, a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year admits the relevancy of *res adjudicata* to demands for taxes, but contends that -herein there are different demands the thing adjudges has no application, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances."

To this argument he responds thus:

"The proposition that because a suit for taxes of one year is a different demand from the suit for a tax for another, therefore, *res judicata* cannot apply; whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists
153 even although there be different demands when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court."

To the argument that "it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year," and that "as a matter of public policy and public necessity the principles of the thing adjudged can never apply to taxation," he responds thus:

"The argument that, as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law-making and not to the judicial department. But, if the judicial mind could entertain the suggestion, it seems clear that it is not without real merit. In its ultimate aspect it asserts that no question concerning government, or public authority, ought ever to be sub-

mitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand and to deny on the other the very substance and essence of such power is not only contradictory but destructive of the fundamental conceptions upon which our system of government is based. Under
154 this theory the case under consideration should not be entertained, but should be dismissed. Accepting this argument in its full consequence every judgment rendered by this court from the foundation of the Government, declaring a particular tax, or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly of the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

In the latter case, Mr. Justice Brewer said:

"The controversy in the case reported in 85 Md. 145, 36 Alt., 764 was one between the estate of the ward and the State of Maryland. In that case the right of the State to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894 was settled. * * * The matter has become *res judicata* between the estate and the State. There is no pretense that the taxes of 1895 stand in any other condition as to the matter of fact than the taxes of 1893 and 1894 which were in terms included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895 comes within the force of that decision, and is determined by the conditions in respect to the taxes of 1893 and 1894. Johnson Stree- R. Co *v.* Wharton 152 U. S. 252, Last Chance Mining Co. *v.* Tyler Mining Co. 157 U. S. 683, New Orleans *v.* Citizens Bank 167 U. S. 371."

And it has been applied by the circuit court of the district of Kentucky and the Supreme Court of the United States in cases exactly like the one in hand, save in a particular herein-
155 after referred to.

Bank of Kentucky *v.* Stone 88 Fed. 394.
Northern Bank *v.* Stone 88 Fed. 413
Farmers Bank *v.* Stone 88 Fed. 987
Louisville Banking Co. *v.* City of Louisville 88 Fed. 988
Third National Bank *v.* City of Louisville 88 Fed. 990
Stone *v.* Farmers Bank 174 U. S. 1037
Stone *v.* Bank of Kentucky 174 U. S. 1187
City of Louisville *v.* Louisville Banking Co. 174 U. S. 1187
Stone *v.* Deposit Bank 174 U. S. 1187

Again defendants urge that this suit is not only to enjoin the collection of different years taxes, but taxes imposed on the shares of stock of national banks by the act of March 21", 1900, whereas the former suit was to enjoin the collection of taxes levied on the franchise of national banks by the revenue law of 1892, which law, by reason of the fact that the taxes were so imposed, was invalid; and the collection of which taxes complainant was entitled to have enjoined on this ground alone, without reference to the question whether it had an irrevocable contract exempting it from other taxes than those imposed by the Hewitt law. This, too, is undoubtedly true—

Owensboro Nat. Bank *v.* Owensboro 173 U. S. 664

It is in this particular that this case is unlike the cases hereinbefore cited which otherwise are, as stated, exactly like it. In all of them except that of

Third National Bank *v.* City of Louisville, 88 Fed. 990,

the banks involved were State banks, and in that case, the circuit court for the district of Kentucky held that the revenue
156 law of 1892 was valid in so far as it affected national banks, basing its judgment entirely on the former adjudication as to the existence of an irrevocable contract under said Hewitt law in favor of said bank and the Supreme Court of the United States affirmed said judgment on the ground that said revenue law of 1892 was invalid as to national banks, and waived a consideration of the effect of said former adjudication—

City of Louisville *v.* Third National Bank, 174 U. S. 1037

Does then the fact that said revenue law was invalid as to national banks and complainant was entitled in the former suit to an injunction against the collection of the taxes for the year 1893 imposed by said law on this ground alone without reference to the question as to whether it was invalid as to complainant also because it impaired the obligation of an irrevocable contract between it and the State uncer the Hewitt law, make any difference? I do not think that it does. The fact that the judgment of a court in a suit might have been based upon another ground than that on which it was actually based does not prevent the determination that such ground existed being conclusive as to its existence in a subsequent suit between the same parties if its existence was in issue in the former suit and properly formed the basis of the judgment therein. Likewise if a judgment in a suit is properly based upon two grounds the determination therein that both grounds exist is conclusive as to the existence of either ground in a subsequent suit between the same parties. In Black on Judgment vol. 2 p. 604, it is said that one of the two main rules which govern the law of estoppel by judgment, as the same may be deduced from the general result of all the authorities, is as follows:—

157 "A point which was actually and directly in issue in a former suit and was there judicially passed upon and deter-

mined by a domestic court of competent jurisdiction, cannot be again drawn in question in any further action between the same parties or their privies, whether the cause of action in the two suits be identical or different."

And again on page 729 it is said:

"It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined."

No exception is stated to this general rule growing out of the fact that other points or facts were directly in issue in the former suit and were or might have been litigated and determined therein, and formed the basis of the judgment therein. As a counter-rule it is stated on page 733 that the judgment is not conclusive "of any matter which was incidentally cognizable in that action or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment." And, on page 734 it is said that an important analogy to this counter-rule "is found in the case of opinions of the appellate courts considered as authoritative statements of the law. A point may be considered and passed upon by the court which comes only incidentally in question and is not necessary to the determination of the case. In that event, the decision, so far as concerns that point, is merely *obiter dictum*, and not entitled to the weight of a precedent." "But," he adds, "where the record in an action of which the court has jurisdiction fairly presents two points, upon either of which the decision might
158 turn, and the court fully considers and determines both, the decision of neither can be considered as an *obiter dictum* and the judgment is authorized on both points."

This latter statement of the law as to the authoritativeness of a decision of an appellate court upon two points involved in a case before it, upon either of which the decision might turn, in subsequent cases involving either one of them finds support in the case of

Howes *v.* Water Co. 5 Sawy. 287; Fed. Cas. 6235

The question decided in that case was whether the court in construing a State statute involved therein was bound to follow a decision of the higher court of that State construing that statute. It is well settled that the Federal court must follow the construction put upon a statute by the highest court thereof and equally well settled that it is not bound to do so if the decision of the State court is a mere dictum. The sub-question in that case was whether the decision of the State court which it was claimed the Federal court should follow was a dictum or not. Judge Sawyer said:

"There were two grounds relied on to show that this was not a proper case for exercising the jurisdiction; (1) That the board of supervisors is a legislative body having a discretion to pass ordinances, and that the court ought not to interfere with its legislative

discretion in advance on the hypothesis that it intends to pass an alleged ordinance, especially when it cannot be known in advance what its intention as a legislative body is; (2) that the city had a right to the water claimed, and a right to take the measures alleged to secure it in case the petitioner should shut it off; and for that reason, also, there was not a proper case for the prohibitory writ. Both grounds were distinctly and squarely presented
159 by the record, and relied on, and the latter more especially fully argued by counsel. The court might just as well have rested its decision on the second ground, if found good, without noticing the first, as upon the first without noticing the second. Or, it might, if thought proper have decided both, as it did. It is a matter of almost every day occurrence that the record presents two or more points, either of which, if sustained, would determine the case and the court decides them all. In such cases it can no more be said that one rather than another is obiter. In this case the court was earnestly presses by counsel on both sides to decide the case on its merits, and give an authoritative construction of the statute. The great anxiety was to ascertain the right of the respective parties and the mode was of no consequence. * * * To say now that the construction of the statute was merely obiter is to say that a vast amount of labor, research, energy and anxiety was expended by counsel and court to no real purpose. * * * It is the very point upon which nearly all of the effort and research of counsel and court were actually expended. This discussion did not in anywise serve to illustrate the other point. Indeed, it had no relation whatever to it. It was a distinct, separate and independent point, and the only one in the case that counsel or parties practically cared anything about. * * * I regard the construction put upon the clause in controversy by the Supreme Court in the prohibitive case cited, as authoritative, and being so, I rest my decision upon that case, without examining the question as an original proposition."

If, then, a decision by an appellate court of a point upon which a case turns, when there is another point upon which it might equally turn or of both points is authoritative in subsequent cases in
160 the one instance as to the one point or in the other as to either point on the principle of *stare decisis*, or on the principle which govern- Federal courts in following the highest court of a State in construing its statute it is equally authoritative on the principle of *res judicata* in a case involving that principle. In the former suit between complainant and defendant—City of Covington, the case turned on either of the two grounds hereinbefore stated. It was made to turn by the Campbell circuit court on both grounds, mainly, however, on the ground that complainant had an irrevocable contract and, by the court of appeals solely upon that ground. The decision therein that complainant had such a contract must therefore be accepted as conclusive in this State, notwithstanding the fact that the former suit could have been made to turn solely on the other ground, to-wit:—that the revenue law of 1892 was invalid as to national banks because the taxes which it imposed on them were

upon their franchises, which the legislature of Kentucky had no power to do. Had the State courts in the former suit granted complainant the relief which it sought therein without giving any intimation as to the ground upon which they granted it then, the judgment therein would not have been conclusive herein upon the question as to whether complainant had an irrevocable contract. For then it could not be told upon what ground complainant had been granted that relief and it is well settled that estoppels must be certain. In the case of

Russell *v.* Place 94 U. S. 606

Mr. Justice Field said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear,
161 either upon the face of the record or be shown by intrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indication which of them was thus litigated and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to new contention, unless this uncertainty be removed by intrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

But no such uncertainty exists here. The sole ground upon which complainant in the former suit sought to have the revenue law of 1892 declared invalid as to it and to enjoin collection of taxes by the defendant city under it for the year 1893 was the existence of said irrevocable contract and the Campbell circuit court granted it that relief on that ground, though it did so on the other ground also and the court of appeals affirmed its judgment on that ground alone. This is made clear by the records in the former suit and there is no uncertainty whatever in regard to it.

Still further defendants urge that the courts of Kentucky, if this suit were pending therein, would give no such effect to the adjudication in the former suit relied on herein and, therefore, this court should not give it any such effect. In support of their contention that the courts of Kentucky give no such effect thereto they cite the following cases, to wit:

162 City of Newport *v.* Commonwealth 50 S. W. 845 51 S. W. 433
Louisville Bridge Co. *v.* City of Louisville, 58 S. W. 598
Negley, sheriff, *v.* City of Henderson, 59 S. W. 19
Bell Co. C. & I. *v.* City of Pineville, 64 S. W. 525
City of Frankfort *v.* Deposit Bank 65 S. W. 10
Louisville Bridge Co. *v.* City of Louisville 65 S. W. 814

The case of City of Newport *v.* Commonwealth was a suit by the State against the city of Newport to recover taxes under the revenue law — 1892 for the year 1894 on the franchise of said city to operate waterworks. Several defenses were made to the suit. Amongst others was a plea of *res judicata*. It was alleged that suit had been brought against the city to recover taxes under said law of 1892 for the year 1893 on said franchise and same had been dismissed by the circuit court, which judgment had never been set aside or reversed. It was claimed that this judgment made the question as to the liability of said city for franchise taxes under said law a thing adjudged and was conclusive on the question. It was held by the court that the judgment in the former suit did not have this effect. And it would seem that the judgment of the majority of the court was placed upon the broad ground that in no case and to no extent could a judgment in a suit as to one year's taxes be *res judicata* as to another year's taxes. Judge Durelle in stating the opinion of the majority of the court based the holding on this reasoning, to-wit:—

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue decided that a contract, out of which several distinct promised to pay money arose, has been adjudged invalid in a suit upon one of these promises, the judgment is an estoppel to a suit upon another promise founded on the
163 same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The tax-payer does not agree to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist regardless of former adjudications as to the validity of a different tax."

And again:

"In our opinion it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years merely because counsel for the Commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the Commonwealth bound by the laches of its officer."

It appears, from his response to a petition for re-hearing that the minority of the court composed of three out of the seven judges desired an extension of the opinion so as to include the qualification upon the general rule laid down as to the application of the doctrine of *res judicata* in tax cases, to-wit:—

"But whether the State is bound by a former adjudication that there exists a contract exempting from taxation, or as to the construction of such contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the Commonwealth exercising the highest of its sovereign powers—a power necessary to its very existence—and the same Commonwealth, its sovereignty laid aside, bending itself as a mere corporate entity by a sealed instrument. But, it is not necessary, in our judg-

ment, to go into this question, nor even to decide that there is a difference."

The two cases styled alike Louisville Bridge Company *v.*
164 City of Louisville were two suits by said city against the bridge company, the one to recover city taxes on its bridge—its tangible property—for the years 1890, 1891, 1892, 1893 & 1894—the other, to recover same on same for the years 1895 and 1896, and also city taxes on its franchise—its intangible property—for the years 1894, 1895, 1896 and 1897. In the case of Louisville Bridge Company *v.* City of Louisville, 81 Ky. 189, which was a suit by said city against said bridge company to recover city taxes on its bridge for the year 188- it had been held that the said bridge was not liable to city taxes because it was not the recipient of the benefits of municipal government. This former adjudication was relied on as a bar in the two subsequent suits to recover taxes for the latter years. It was held that it was not a bar. In the former of the two cases Judge Burnam said:—

"In response to appellant's plea of *res judicata* it may be said that this identical question was before the court in the case of Henderson Bridge Co. *v.* City of Henderson, decided June 24", 1896, and, in the very recent cases of Newport *v.* Masonic Temple Ass'n 45 S. W. 881, 46 S. W. 697 and City of Newport *v.* Com. 50 S. W. 845, 51 S. W. 433. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and, as the question is fully considered in these cases, it is unneccessary to elaborate it again."

In the latter of the two he said:

"The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for it to consider this question; it having been expressly decided that a judgment
165 by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's tax. See Henderson Bridge Co. *v.* City of Henderson, 90 Ky. 498, 14 S. W. 493; Same *v.* Com. 99 Ky. 623 31 S. W. 486, 29 L. R. A. 73; City of Newport *v.* Com. 50 S. W. 845—45 L. A. R 518."

In regard to these two cases it is to be noted that as to all the taxes involved therein save for the year- 1890 and 1891 there was not the same question as was adjudged in the earlier case in 81 Ky. and, as to those two years it was held that the bridge company was not liable. As to the other years there was not the same question because it had been held in previous cases referred to in said two cases that section 174 of the constitution of Kentucky adopted Sept. 28", 1891 which applied to all years after 1891, had changed the rule in regard to the liability of property in cities and towns not enjoying the benefits of municipal government. The bridge company was held not liable for the years 1890 and 1891 not on the ground of said former adjudication, but because it had acted on it and not collected taxes from its tenants for those years who were

under an obligation to it to pay all its taxes. As to the cases cited by Judge Burnam in said extracts from his opinions in support of the proposition there laid down, none of them are to that effect, save the Newport case, to which we have already referred. The Henderson Bridge cases do not involve any question as to *res judicata*, except that one decided June 24, 1896 and, in that case its decision was expressly waived. The question in the case of Newport *v.* Masonic Temple Ass'n was the same as that involved in the Louisville Bridge Company cases as to taxes after 1891. The charter of the Masonic Temple Ass'n passed March 29", 1880, exempted
166 its property from taxation. It had been sued for taxes for several years prior to the new constitution of 1891 and held not liable because of this exemption. In a suit for taxes after the adoption of that constitution it was held that that instrument repealed said exemption and that hence the former adjudication was no bar to suit for said taxes. The only case so cited which was in point was the Newport Water Works case which is the pioneer and leading authority in Kentucky upon the question under consideration.

The case of Nagley, sheriff, *v.* City of Henderson was a suit by said city against the sheriff of Henderson county to enjoin collection of State and county taxes for the years 1896 and 1897 on its franchise to operate water-works in said city. In support of its claim not to be liable for taxes on said franchise the city alleged in its petition that in a former suit by it against the sheriff the circuit court of Henderson county had enjoined the collection of taxes on its tangible property for the years 1894, to 1897 inclusive. It was held that the former adjudication was not conclusive of the city's right to enjoin said franchise taxes. Judge Durelle said:—

"This brings us to consider the question of *res judicata*. It was in City of Newport *v.* Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the tax for another year. It seems to us equally clear that it does not create an estoppel against the collection of a different tax upon different property for the same year. If the one proposition be true the other must be true, also."

The case of Bell Co. C. & I. Co. *v.* City of Pineville was a suit by said company against said city to enjoin collection of taxes upon its property within said city for years 1895 to 1898 inclusive on
167 the ground that it was used for farming purposes and derived no benefit from the city government. A judgment in a similar suit of the Bell circuit court enjoining the collection of taxes for the year 1891 on the same ground was plead by the company as concluding the question of its liability for the subsequent year's taxes. It was held that it had no such effect. Judge Durelle said:

"The case of City of Newport *v.* Com. 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, is decisive of the question raised by this plea of *res judicat*:"

It will be not- here, though not referred to in the opinion, that the

rule as to liability of property in a city not enjoying the benefits of municipal government to city taxation was changed between the year 1891, taxes for which were involved in the former suit, and the years 1895 to 1898 inclusive, taxes for which were involved in the suit in hand, by the constitution of 1891—so that in no event was the doctrine of *res judicata* applicable to the case.

The case of City of Frankfort *v.* Deposit Bank is somewhat novel in its character. The Franklin circuit court in a suit by the city against the bank for taxes for the years 1895 and 1894 under the revenue law of 1892, adjudged under authority of the decisions of the court of appeals in the first bank tax cases that the bank was not liable therefor because it had an irrevocable contract under the Hewitt law of 1886 exempting it from taxation other than under said law. Thereafter in a suit by the bank against the city in the United States circuit court for the district of Kentucky the latter was enjoined from collecting taxes under said revenue law of 1892 for the years 1895 to 1898 inclusive, on the ground of the adjudication that it had such a contract in the former suit in the Franklin circuit court and, that notwithstanding that the court of
168 appeals in the second bank tax cases had over-ruled its decision in the first bank tax cases on authority of which the judgment of the Franklin circuit court had been rendered. This judgment was affirmed by the Supreme Court of the United States on an appeal therefrom by the city.

Stone *v.* Deposit Bank of Frankfort, 174 U. S. 1187

After the decision of the court of appeals in the second bank tax cases, time for an appeal from said judgment of Franklin circuit court not having elapsed an appeal was taken therefrom to the court of appeals and it reversed the judgment on authority of its decision in the second bank tax cases. On the return of the case to the Franklin circuit court the bank plead the judgment of the United States circuit court affirmed by the Supreme Court as to taxes for 1895 to 1898 inclusive which had been based upon said former judgment of Franklin circuit court as to years 1893 and 1894 in bar of the city's right to recover taxes for said years in said suit. It was held that the plea was not good and on appeal to the court of appeals it affirmed the ruling of the lower court. In the opinion after showing that the doctrine of *res judicata* could not be applied in such a case Judge Paynter added:

"However, we do not hold that the judgment of the Federal court is not a bar to a recovery of the taxes for the years 1893 and 1894. This court in City of Newport *v.* Com. 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518 and Louisville Bridge Co. *v.* City of Louisville, 58 S. W. 598 held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

This detailed examination of the cases relied on by defend-
169 ants in support of their contention that according to the law, as laid down in the State courts the former adjudication relied on herein is not conclusive of complainant's exemption from

liability for the taxes involved herein, because they are taxes for years different from and subsequent to the year for which the taxes involved therein were levied, leads to the conclusion that the contention is correct thought some if not most of said cases for the grounds stated are not in point and in none of them was the former adjudication based upon an exempting contract covering all of the years' taxes involved in both suits, I think that there can be no question as to this. Complainant cites the cases of

Thompson *v.* Louisville Banking Co. 55 S. W. 1080
Hardwicke *v.* Young 62 S. W. 10

decided by the court of appeals of Kentucky as being contra to defendant's contention in the matter under consideration. These cases, however, are not against that contention. In each case the same year's taxes was not involved in that court on a second appeal. Of course a decision of the court of appeals that a certain year's taxes are invalid is binding as to the validity of that year's taxes on a second appeal of that case to that court. And a holding that its former decision in that same case is binding is not an authority in favor of the position that a decision that one year's taxes rendered in one case is binding in another case as to another subsequent year's taxes.

It must be accepted, therefore, that the State courts, in view of said decisions, would not give the effect to the former adjudication relied on herein by complainant which it contends for and which this court, under the decision of the Supreme Court of the United States, hereinafter cited, would otherwise be bound to give it. It remains to be considered what effect is to be given to this fact.

170 And here we are not without authority proceeding from the Supreme Court. In the case of

Union & Planters Bank *v.* City of Memphis

decided, April 13", 1903, it was held that a former adjudication in State courts between the parties thereto in relation to the liability of the former to the latter for taxes for the years 1889 to 1891 inclusive was not conclusive as to such liability for the year 1899, because it was not conclusive in the State courts. Mr. Chief Justice Fuller, in delivering the opinion of the court said:

"It is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case in as much as what effect a judgment of a State court shall have as *res judicata* is a question of State *of* local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. Phœnix Fire & Marine Ins. Co. *v.* Tennessee, 161 U. S. 174. In New Orleans *v.* Citizens Bank 167 U. S. 371 referred to by appellant's counsel no claim was made that the judgment relied on would not have been *res judicata* in the State courts and attention was particularly called to the fact that the rule in Louisiana was in accord with the conception of *res judicata* expounded in that case. As the judgment

pleaded had no force or effect in the Tennessee State courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can afford it no greater efficacy. Cooper *v.* Newell, 173 U. S. 555; Metcalf *v.* Watertown, 153 U. S. 671; Chicago & Alton R. R. Co. *v.* Wiggins Ferry Co. 108 U. S. 118; Rev. Stat. sec. 905."

This case is binding upon me and settles the matter in accordance with defendants' contention. It is true that, in the cases
171 hereinbefore cited, the Supreme Court held as to certain of the banks involved along with the complainant in the litigation which resulted in the decision in 97 Ky. — that they were exempted from other taxation than under the Hewitt law bylan irrevocable contract, that said decision made the question *res judicata* as to subsequent years, but at the time it is so held there had been no decision by the court of appeals of Kentucky as to the effect of an adjudication in relation to one year's taxes upon other year's taxes. Since then, as we have seen, that court has taken position that such adjudication is not a bar to a consideration of the question of the liability for the other year's taxes on its merits. That being so, I feel bound by the decision of the supreme court in the Tennessee case to hold that the former adjudication relied on herein is not a bar to a consideration of complainant's liability for the taxes involved herein on the merits. And so considering it, I am bound by the decision of the Kentucky court of appeals in the Second Bank Tax cases and of the Supreme Court in the Owensboro case to hold also that complainant has no irrevocable contract under the Hewitt law, and that, therefore, the complainant is liable under the act of March 21", 1900, to the taxes which have accrued or will accrue since its passage. A decree will, therefore, be entered dismissing complainant's bill as to said taxes and permitting the decree entered pursuant to the opinion of Judge Evans in relation to former years' taxes to stand as entered.

A. M. J. COCHRAN, *Judge.*

172 And, on a day following, to-wit, on June 16th, A. D. 1903 decree was entered herein which was and is in words and figures following, to-wit:—

Order Book "J," page 88.

Decree.

This cause having been submitted and the court being sufficiently advised files its opinion herein.

It is therefore ordered, adjudged and decreed as follows:—

1. That the complainant's bill of complaint herein is dismissed in so far as it seeks to enjoin the assessment and collection of taxes for any time subsequent to March 21st, 1900.

2. The decree entered pursuant to the opinion of Judge Evans on the 17th day of December, 1900, is permitted to stand as entered.

3. That the defendants recover of complainant so much of defendants' costs herein as accrued subsequent to December 17th, 1900.

To so much of this decree as permits the said decree entered pursuant to the opinion of Judge Evans, on December 17th, 1900, to stand as entered, the defendants except.

To so much of this decree as is adverse to complainants complain-t by counsel comes and excepts.

And, on a day following, to-wit, on June 20th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "J," page 92.

This cause coming on to be heard upon the defendants' petition for appeal, praying an appeal from the decree and order entered herein on the 16th. day of June, 1903, to the Supreme Court
173 of the United States, and the assignment of errors filed herein. The court being fully advised it is ordered that the appeal prayed for by the defendants herein, be and the same is now granted and the claim of appeal therein made is allowed. And, it is further ordered that the appeal bond be filed at the sum of one thousand dollars ($1000.00).

Whereupon came the defendants herein and offered bond in the sum of ($1000.00) one thousand dollars, with the American Bonding Company of Baltimore as surety, which bond is hereby approved.

And, on the same day to-wit, on June 20th. A. D. 1903 petition for appeal was filed herein which was and is in words and figures following, to-wit:—

Petition for Appeal.

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON ET AL., Defendants.

The defendants, City of Covington *et al.*, conceiving themselves aggrieved by the decree and order made and entered herein on the 16th day of June, 1903, in the above entitled cause, do hereby appeal from said decree and order to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith, and pary that this appeal be allowed and that a transcript of the record, proceedings and papers upon which said decree

and order was made and entered, duly authenticated, may
174 be sent to the Supreme Court of the United States.

W. H. JULIAN,
F. J. HANLON,
Att'ys for Defendants.

And, on the same day, to-wit, on June 20th., A. D. 1903, assignment of errors was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Complainant,
vs.
THE CITY OF COVINGTON ET AL., Defendants.

Assignment of Errors.

For assignment of errors in the decree and order made and entered in the above entitled cause on the 19th., day of May 1903, the defendants City of Covington *et al.*, say; said decree and order is erroneous and against the rights of the defendants because: 1st., the court erred in permitting the decree entered herein on the 17th day of December, 1900 pursuant to opinion by Judge Evans to stand as entered. The said decree entered pursuant to opinion by Judge Evans was erroneous in holding the act of March 21st., 1900 to be invalid in so far as the same was retro-active and in
175 enjoining the assessment and collection of taxes for any time prior to that date, and should have been set aside on the motion of the defendants made for that purpose.

2nd. The court erred in over-ruling the motion of the defendants to set aside said decree entered on Dec. 17th., 1900, pursuant to opinion by Judge Evans.

3rd. The court erred in enjoining the defendants from proceeding to assess the shares of stock in complainant for the purpose of taxation for any time previous to March 21st., 1900 and from collecting any tax for any time previous to March 21st., 1900.

4th. The court erred in overruling the defendants' motion to file an answer to the bill of complaint as amended herein.

5th. The court erred in holding the act of March 21st., 1900 to be invalid in so far as the same was retro-active.

6th. The court erred in overruling the defendants' demurrer to the bill of complaint as amended; and in granting any injunction herein, and in adjudging any costs against the defendants.

7th. The court erred in over-ruling defendants' plea to the jurisdiction of the court herein.

W. H. JULIAN,
F. J. HANLON,
Att'ys for Defendants.

And, on the same day to-wit, on June 20th., A. D. 1903, appeal bond was filed herein which was and is in words and figures following, to-wit:

176 United States Circuit Court.

FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
vs.
THE CITY OF COVINGTON ET AL., Defendants.

Appeal Bond.

Know all men by these presents, that we The City of Covington, Ky., and John Middendorf, assessor of said city, as principals and The American Bonding Company of Baltimore as surety, are held and firmly bound unto the complainant, The First National Bank of Covington, Ky., in the just and full sum of one thousand ($1000.00) dollars, to be paid to the said complainant, their attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Signed and sealed this 18th day of May, 1903.

Whereas lately in the circuit court of the United States for the eastern district of Kentucky at Covington in a suit pending therein between The First National Bank of Covington, Ky., complainant and The City of Covington, Ky., *et al.*, defendants, a decree was rendered against the defendants; and the said defendants having obtained an appeal to reverse the said decree against them and a citation directed to the aforesaid complainant admonishing it to be and appear in the Supreme Court of the United States in the city of Washington, D. C., at the October, 1903, term thereof.

177 Now, the condition of the above obligation is such that if the said City of Covington, Ky., and John Middendorf shall prosecute said appeal to effect and answer all costs if they fail to make the said plea good, then the above obligation should be void, otherwise to remain in full force and virtue.

Witness our hands the date above written.

THE CITY OF COVINGTON,
By W. A. JOHNSON, *Mayor*,
Principals.

Approved—
A. M. J. COCHRAN,
U. S. District Judge.

AMERICAN BONDING COMPANY
OF BALTIMORE,
By BEN A. ADAMS, *Vice Pres.*

Attest: L. J. DROEGE, *Ass't Sec'y.*

178 And, on a day following, to-wit, on July 14th, A. D. 1903 citation was issued herein which was and is in words and figures following, to-wit:—

Citation.

Supreme Court of the United States.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

To the City of Covington, Kentucky, and John N. Middendorf, the assessor of the city of Covington, Greeting:

You are hereby cited to be and appear at a session of the Supreme Court to be holden at the city of Washington, D. C. on the 14th day of August next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, wherein, First National Bank of Covington, Kentucky, is appellant and you are appellee-, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of July in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America the one hundred and twenty eighth year.

A. M. J. COCHRAN,
United States District Judge, Eastern District of Kentucky.

179 And, on a day following, to-wit, on July 15th, A. D. 1903 said citation was returned endorsed in words and figures following, to-wit:—

I hereby accept service of within citation for the City of Covington, and John N. Middendorf, city assessor, appellees this 15th, day of July, A. D. 1903.

F. J. HANLON,
City Solicitor.

180 And on a day following: to-wit:—on June 30th, A. D. 1903—an entry was made herein, clothed in words and figures as follows to-wit:—

Journal J, page 100.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, }
vs.
THE CITY OF COVINGTON, KENTUCKY. }

This day came the complainant herein and by leave of court first had and obtained, now files its petition for appeal herein and as-

signment of errors, and prays an appeal from the decree and order of this court to the Supreme Court of the United States.

The court being fully advised it is now ordered that the appeal prayed for by the complainant herein be and the same is hereby granted. And it is further ordered that the injunction heretofore granted, be continued in force pending said appeal, until the final judgment and decree of the said Supreme Court of the United States.

It is further ordered by the court that the complainant herein give a bond in the sum of $20,000.00 with good and sufficient surety as an appeal bond and an indemnity bond.

Whereupon came the complainant and offered bond in the said sum of $200,000.00 which bond was approved by the court and ordered filed.

181 And, on the same day, to-wit, on June 30th., A. D. 1903 petition for appeal was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court for the Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON & JOHN MIDDENDORF, Assessor, Defendants.

The above named complainant, The First National Bank of Covington, Ky., conceiving itself aggrieved by the final decree, order and judgment entered in the above entitled cause, June 16th, 1903, hereby appeals separately from so much of said final decree, or order, as dismisses its bill, and refuses to grant a perpetual injunction sought in said bill against the defendants, The City of Covington and John Middendorf, its assessor, from and after March 21st., 1900.

And the First National Bank of Covington, Ky., prays that this, its appeal to the Supreme Court of the United States may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, order and judgment was made, duly authenticated may be sent to the said Supreme Court of the United States.

And now at the time of filing this petition for appeal The First National Bank of Covington, Ky., appellant, files an assign-
182 ment of errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

And your petitioner will ever pray.

S. D. ROUSE,
Att'y for Complainant.

And, on the same day, to-wit, on June 30th., A. D. 1903, assignment of errors was filed herein which was and is in words and figures following, to wit:—

United States Circuit Court, Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, Assessor of the City of Covington, Defendants.

Assignment of Errors.

The complainant prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:—

First. That the court erred in dismissing the bill of com-
183 plaint herein in so far as it sought to enjoin the assessment and collection of taxes by the defendant subsequent to March 21st., 1900.

Second. That the court erred in refusing to make the temporary injunction herein before granted perpetual for the full period of the charter existence of complainant herein.

Third. That the court erred in failing to adjudge that the complainant, The First National Bank of Covington, Ky., had an irrevocable contract with the Commonwealth of Kentucky upon the continued compliance by it with the provisions of the act of the General Assembly of the Commonwealth of Kentucky of May 17th., 1886, whereby no taxes for municipal purposes can be exacted from it, or imposed upon the shares of stock of complainant, or upon any of its property of any kind, except its real estate and banking building during the corporate existence of said complainant, to-wit, until and including the 17th of November, 1904.

Fourth. That the court erred in failing and refusing to declare the act of the General Assembly of the Commonwealth of Kentucky, approved March 21st., 1900, in so far as it attempts to impair the validity of said contract, to be null and void.

Fifth. That the court erred in failing and refusing in said decree to adjudge that the contract between the Commonwealth of Kentucky and this complainant was, and is *res adjudicata*, and that the defendant, The City of Covington, is estopped to claim or assert that complainant has not such irrevocable contract.

The complainant prays that this court by proper orders upon such terms as it may prescribe as to bond, will continue the temporary injunction herein in force pending the appeal.

Wherefore complainant herein prays that the decree of the circuit court herein upon the errors assigned may be reversed.

S. D. ROUSE,
Complainant's Att'y.

184 And, on the same day, to-wit, on June 30th., A. D. 1903 a bond was filed herein which was and is in words and figures following, to-wit:—

Bond.

Know all men by these presents, that we, The First National Bank as principal, and Bradford Shinkle as surety are held and firmly bound unto the City of Covington, Ky., and John N. Middendorf, the assessor of the city of Covington, Kentucky, in the full and just sum of twenty thousand dollars, to be paid to either of them, as their interests may appear, to which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our successors, assigns, executors and administrators.

Given under our hands and sealed with our seals and dated this 30th. day of June, 1903.

Whereas the above named complainant, The First National Bank of Covington, Ky., hath prosecuted its appeal to the Supreme Court of the United States, to reverse in part the final judgment and decree rendered in the above entitled suit, by the circuit court of the United States for the district of Kentucky; now, therefore, the condition of this obligation is that, if the above named, The First National Bank of Covington, Kentucky, shall prosecute its said appeal to effect and answer all costs and damages that may be adjudged, or awarded against it, if it shall fail to make good its plea, then

185 this obligation to be void; otherwise in full force.

In presence of

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
By FRANK P. HELM, *President.*
BRADFORD SHINKLE.

Approved this June 30th., 1903,
A. M. J. COCHRAN, *Judge.*

186 And, on a day following, to-wit, on July 14th., A. D. 1903 citation was issued herein which was and is in words and figures following, to-wit:—

Citation.

Supreme Court of the United States.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

To First National Bank of Covington, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the 14th day of August next, pursuant to

an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, wherein, The City of Covington, Kentucky, and John N. Middendorf, the assessor of the city of Covington are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of July, in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America the one hundred and twenty eighth.

A. M. J. COCHRAN,
United States District Judge, Eastern District of Kentucky.

187 And on a day following, to-wit, on July 15th., A. D. 1903, said citation was returned endorsed in words and figures following, to-wit:—

I hereby, this July 15th., 1903 accept due personal service of this citation on behalf of The First National Bank of Covington, Kentucky, appellee.

S. D. ROUSE,
Solicitor for Appellee.

188 UNITED STATES OF AMERICA, *Eastern District of Kentucky,* } ss:

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and eastern district of Kentucky, at Covington, do hereby certify that the foregoing 187 pages contain a full, true and complete transcript of the file and proceedings had herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness, my hand as clerk, and the seal of said court, at Covington, this — day of July A. D. 1903, and of our Independence the 128 year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

JOS. C. FINNELL, *Clerk,*
By J. W. MENZIES, *D. C.*

Endorsed on cover: File No. 19,065. E. Kentucky C. C. U. S. Term No. 414. The City of Covington and John Middendorf, assessor of said city, appellants, *vs.* The First National Bank of Covington, Kentucky. File No. 19,066. Term No. 415. The First National Bank of Covington, Kentucky, appellant, *vs.* The City of Covington and John Middendorf, assessor of said city. Filed September 12th, 1903. File Nos. 19,065 and 19,066.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 414.

THE CITY OF COVINGTON, KY., AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KY.....Appellants,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY.....Defendants in Error.

No. 415.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY.....Appellant,

vs.

THE CITY OF COVINGTON, KY., AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KY.....Defendants in Error.

MOTION TO ADVANCE.

The City of Covington, Ky., and John N. Middendorf, Assessor, now come and move the court that the above styled causes be advanced for hearing at as early a date as may be convenient and proper under the rules of court.

The matter involved in said causes is the claim of the City of Covington, Ky., of the right to assess and collect city taxes from the First National Bank of Covington, Ky., under city ad valorem levies for the years 1893 and subsequent years.

The right to collect said taxes is claimed by said city under and by virtue of its charter (charter of cities of the second class in Kentucky) and a certain act of the Kentucky Legislature, approved on March 21st, 1900, which act is as follows:

CHAPTER 23.

AN ACT relating to the taxation of the shares of stock of national banks.

Whereas, The Supreme Court of the United States has lately decided that article three (3), chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

§ 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

§ 3. When any of said shares of stock have not been listed for taxation for any of said purposes, under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; Provided, That where any national bank

has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years. And provided further, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

§ 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

§ 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

§ 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

§ 7. Whereas, It is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage.

Approved March 21, 1900.

Payment of said taxes is resisted by said Bank upon the ground, first, that said Act is in conflict with section 5219 of the Revised Statutes of the United States, and is unconstitutional; and second, that said Bank is protected by a certain adjudication from all taxation during its corporate existence, except that provided for by what is known as the Hewitt law—a revenue statute of Kentucky adopted in 1886.

The reasons for this application are:

1st.—That the matters involved are of great public interest to the State and taxpayers of Kentucky. It is important to all

the banks and other taxpayers of Kentucky that the law as to the taxation of the shares of stock in national banks should be speedily settled.

2d.—This is the second time that this case has been before this Court on appeal.

Wherefore, the City of Covington and John N. Middendorf, assessor, pray that these causes be advanced and heard at as early a date as may be convenient and proper under the rules of court.

F. J. HANLON, City Solicitor,

AND

W. H. JULIAN,

For said city and assessor.

Supreme Court of the United States.

The City of Covington, Kentucky, and John N. Meddendorf, Assessor of the City of Covington,
Appellants
vs.
The First National Bank of Covington,
Appellee
and
The First National Bank of Covington, Kentucky,
Appellant
vs.
The City of Covington and John N. Meddendorf, Assessor of the City of Covington, Kentucky,
Appellees.

Nos. 113-114.

BRIEF FOR THE CITY OF COVINGTON.

Statement of the Case.

There are about one hundred National banks in Kentucky, and ninety-five of this number are paying State and local taxes on their shares of stock under an "Act relating to the taxation of the shares of stock of National banks," approved on the 21st of March, 1900 (which may be found on pages 53-54 of this Record). But the First National Bank of Covington seeks, in this action, to enjoin the City of Covington from the collection of any taxes under said act, upon two grounds (stated at length in the petition):

First. Because of an alleged contract, under the Hewitt law, existing only by reason of an estoppel by *res judicata*.

Second. Because it is claimed said act of March 21, 1900, is repugnant to Section 5219, Revised Statutes of United States, and therefore void.

A general demurrer to the petition, as amended, was presented by the city.

The case having been heard, the court below (Hon. Walter Evans then being Judge thereof), granted and perpetuated the injunction prayed for as to taxes for any time prior to March 21, 1900 (date of adoption of said act), but refused the injunction as to taxes for any time subsequent to said date. The judgment of the court below, therefore, in effect, overruled the plea of estoppel by reason of the said adjudication in 1895, and sustained the said act of March 21, 1900, except as to the retrospective feature thereof. To that judgment the appellants excepted and prayed an appeal to this court, which was dismissed; and the case is again here practically on the same questions. The sufficiency of the alleged estoppel, by former adjudication, and the validity of the said act of 1900, being the only questions arising on these appeals.

Specification of Errors.

The court erred in permitting the decree entered pursuant to the opinion of Judge Evans, on the 17th day of December, 1900, to stand as entered (page 65 of the Record).

Brief of Argument.

IS THE ACT IN CONTROVERSY UNCONSTITUTIONAL BECAUSE ITS RETROACTIVE PROVISION IS REPUGNANT TO SECTION 5219, REVISED STATUTES OF UNITED STATES?

We need not remind this Honorable Court "that every possible presumption is in favor of the validity of a statute; and this continues until the contrary is shown beyond a rational doubt."

(*Sinking Fund cases*, 99 U. S., 700).
(*Powell vs. Pennsylvania*, 127 U. S., 684).

First, let us look at the origin and purpose of this act of 1900. In 1892, the Kentucky Legislature adopted an act, entitled "An act relating to revenue and taxation," Article three (3) of which related to the assessment and taxation of corporate franchises. (See Acts, 1891-'92-'93, page 277, which is incorporated in Kentucky Statutes as Chapter 108).

This said act of 1892, by its express terms, applies to both State and National banks.

In 1899, in *Owensboro Nat. Bank vs. City of Owensboro*, 173 U. S., this court held that said Article three (3), relating to the taxation of corporate franchises, was void in so far as it proposed the taxation of the franchises of National banks.

At the next succeeding Legislature thereafter, on March 21, 1900, the Kentucky Legislature, in view of said decision by this court, adopted the act now in controversy, in order to conform its revenue laws to the said decision.

The *ad valorem* levies, State and local, were imposed each year since 1892. Same have been paid by State banks and other taxpayers generally. National banks and the shareholders therein have received their share of the benefits of said levies.

The retroactive feature of said act is not inhibited by either the State or Federal Constitution. It does not impair the obligation of any contract. It does not take private property for public use without just compensation previously rendered. It only requires the owners of National bank shares to pay a just compensation for the bene-

fits they have received under and in consequence of said ad valorem levies. It only provides a remedy for correction of a wrong and enforcement of a right. When the ad valorem levies of each year were imposed, the right of the State and localities to taxes thereunder upon National bank shares arose. As lately declared by Kentucky Court of Appeals: "When the tax levy is made, the liability (for taxes) accrues. For such liability a lien existed on his property (*Board of Councilmen vs. Mason & Ford Co.*, 100 Ky., 48; Blackwell on Tax Titles, 5th Ed. (1889), Sections 324 and 327; Kentucky Statutes, Sections 3176 and 3375).

The Hewitt law having been repealed prior to 1893, and the Revenue Act of 1892 being void, in so far as it proposed taxation of the franchises and property of National banks, the shares in National banks were left, in 1893, subject to taxation for State and local purposes, under the Constitution and revenue laws of Kentucky, precisely as if neither said Hewitt law nor act of 1892 had ever been enacted. (Constitution, Kentucky, Sections 170, 171, 172 and 174; Kentucky Statutes, Sections 4020, 4022, and the charters of first, second, third, fourth, fifth and sixth class cities, incorporated in Kentucky Statutes; *Scobee, Sheriff, vs. Bean, &c.*, 22 Ky. Law Rep., 1076).

Section 171, Kentucky Constitution provides: "They (taxes) shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." These constitutional and statutory provisions fix the situs of all National bank shares for purposes of taxation "where the bank is located, and not elsewhere." Otherwise, taxation of same could not be uniform nor equal. The Constitution of Kentucky does not contemplate that some of the shares in a National bank may be taxed where the bank is located, and other shares in the same bank taxed elsewhere. Such would conflict with the principle of uniformity and equality in taxation expressly

incorporated in the present Constitution of Kentucky. (*Maltby vs. R. & Col. Ry. Co.*, 52 Pa. St., 140, and authorities there cited).

It will be noted the value of real estate of this bank is deducted from the assessed value of the shares—(Record, page 80).

Retroactive legislation is discussed with much force and clearness in *Butler vs. City of Toledo*, 5 Ohio State, 225, and we invite the special attention of this Honorable Court to the authorities there collated.

"Retrospective laws which violate no principle of natural justice, but are in furtherance of equity and good morals, are not forbidden by the Constitution" (*Marion County vs. L. & N. R. R. Co.*, 91 Ky., 388, and authorities there cited; *Mattingly vs. Dist. of Col.*, 97 U. S., 687; *L. & N. R. R. Co. vs. Commonwealth*, 1 Bush Ky. R., 250; Cooley's Con. Lim., 5th Ed., pp. 455 to 471). In order to secure uniformity of taxation, the Revenue Statutes of nearly all the States expressly authorize retrospective assessments.

The Court of Appeals of Kentucky, in the case of *Town of London vs. Hope et al.*, reported in 26th Kentucky Law Reporter, page 112 (decided May 13, 1904), held that the provisions of the act of March 21, 1900, which provides "for the assessing of shares of stock in National banks, retrospectively," was a valid exercise of the legislative power. For the convenience of the court, we quote briefly from the opinion in said case:

> "Section 3 of this statute contains the express provision that when any shares of stock have not been listed for taxation for State, county or municipal purposes, under levy or levies, for any year or years since 1892, it shall be the duty of the president and cashier to list the same for taxation, under levy or levies for the years omitted. We do not see how the legislative intent to assess the shares of stock retrospectively

could have been made plainer than by the language employed in Section 3 of this act. Nor is the provision of the act invalid for the reason that it thus seeks to retrospectively tax the shares of National banks for the years which they have escaped taxation.

"Cooley, in his work on Taxation, 2d Edition, page 291, says: 'The basis of an apportionment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as to those which may be received thereafter. It has, therefore, been very properly held that there is no constitutional or other legal objection to the levy of taxes to pay for municipal improvements which had been previously made. Nor in apportioning the tax as between individuals is there any valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year, instead of upon an estimate of the business of the year to come. Where taxes are levied for a series of years upon the same valuation of property, they are necessarily retrospective, but not, therefore, incompetent, though one may be taxed upon property which he long ceased to own when the tax is levied. But there is commonly a presumption that any new tax law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence. "New burdens," it is very justly said, "ought always to be prospective," and it is reasonable to suppose the Legislature has intended that they should be. Such a supposition is in harmony with the general rule of law which requires the courts to "always construe statutes as prospective, and not retrospective, unless constrained to the contrary course by the rigor of the phraseology." This is the rule not only as a construction of the grant of power, but also as to all the incidents; though a remedial provision may well be presumed to have been intended to reach back for the purpose of justice.'"

But if there could be a shadow of doubt as to the validity of this act of 1900 on account of its retroactive feature, a recent decision of this Honorable Court must remove all such doubt. This is a case of *Florida Cen. & Pen. R. R. Co. vs. Reynolds*, 183 U. S., 471. (For convenience we copy the syllabus of Justice Brewer's opinion).

> "There is nothing in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected, through lack of statutory provision therefor, or in consequence of a *misunderstanding as to the law*, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property."

Now, in view of *Mercantile Nat. Bank vs. New York* (121 U. S., 138), and other cases of like import, the Legislature of Kentucky of 1892 thought that National banks could be lawfully taxed as provided in Article 3, Chapter 108, Kentucky Statutes, and continued under that impression until the decision of this Honorable Court in case of *Owensboro National Bank vs. Owensboro* (173 U. S.).

Therefore this "misunderstanding of the law" fully authorized the retroactive section of the act of 1900.

Besides, it must be remembered the Kentucky Court of Appeals expressly decided that the shares of stock in National banks in Kentucky were subject to taxation for local purposes under the general revenue law for the years 1892 to 1900 (*Scobee, Sheriff, vs. Bean*, 22 Ky. L. R., 1076), and this is only a *curative statute*.

In *City of Chester vs. Black* (Pa., 6 L. R. A., 802), it was held that where local improvements were made by a city under legislative authority subsequently declared unconstitutional, it was competent for the Legislature to pass an act authorizing a reassessment to meet the cost of such improvement.

In *Mills vs. Charleston*, 29 Wisconsin, 400, it was held a tax void for want of proper legislation to justify it may be reassessed after proper legislative action.

(See also *Re Van Antwerp*, 56 New York, 261, and Desty on Taxation, 647).

The Legislature may pass an act directing a reassessment, although the prior act directing the assessment was declared invalid.

Long vs. Kiende, 27 Hun., 66.

Where an exercise of taxing power fails from any cause and a tax is reassessed, it is a debt due upon the reassessment as from the time when it should have been first assessed.

Plummer vs. Marathon Co., 46 Wis., 184.

Where taxation proves abortive, either by failure of the law under which it is made, or by the nonfeasance or misfeasance of officers, a reassessment under the general law for such cases, or by special legislative enactment gives the taxpayers no reasonable ground for complaint. (Cooley on Taxation, 309).

In order to create some apprehension that injustice may be done the owners of the shares of National banks by retroactive assessments, counsel for the bank may ask the question:

> "Suppose some of the shares of this bank had been transferred to a *bona fide* purchaser during some of the years when no assessment of the stock had been made, or during the years prior to 1900, for which we are now endeavoring to collect taxes on same, could this purchaser be now required to pay taxes on the stock so purchased?"

We answer: *If there was no law authorizing* the assessment of such shares, and no lien existing thereon, then

a *bona fide* purchaser would have taken it *free from any liability* for the taxes for such years (*Florida Central & Pen. R. R. vs. Reynolds*, 183 U. S., 471), and the bank (having a record of owners of shares) could protect itself and the shareholders by *showing the facts*.

But we insist that no such equity can be asserted, as to the shares of this bank, (a) because the situs of taxation was in Kentucky, at the place where the bank was located, by the express provision of Section 5219, U. S. Statutes; and (b) because the shares were liable to taxation and subject to assessment under the revenue laws of Kentucky during the years from 1893 to 1900, as expressly decided by our Court of Appeals in *Scobee, Sheriff, vs. Bean*, 22 Ky. L. R., 1076, and, therefore, under the Constitution and laws of Kentucky there was a valid and *subsisting lien on each of said shares for city taxes for each year from* 1893 *to* 1900.

His Honor, Judge Evans, in his opinion herein, says:

> "At all events, for the reasons indicated, it seems to the court to be very clear that Section 3 of the act (of 1900) conflicts with the requirements of Section 5219 (U. S. Statutes), because there is nowhere any corresponding retroactive imposition on State bank shares; and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on State banks by the franchise act" (Record, page 57).

But we beg leave to call your Honor's attention to the fact that, under the statute law of the State of Kentucky, the *rate of taxation* is the *same on real estate as upon personal* property and choses in action; and, in Kentucky, statutory provision is made for the retrospective assessment of *all property*.

> (Kentucky Statutes, Sections 4090-4241).
> (*Lou. & Jeff. Ferry Co. vs. Com.*, 22 Ky. L. R., 446).

Moreover, the supposed dangers contained in the retroactive Section (3) of the act of 1900, making it possible to reach back indefinitely in assessing shares of National banks (which seemed to haunt the mind of His Honor, Judge Evans), are now entirely removed and destroyed by the fact that under the present revenue laws of the State of Kentucky (as recently construed by our Court of Appeals) *five years' limitation prevents the retrospective assessment of the shares of National banks beyond five years from the time the assessment should have been made.*

Discrimination.

IS THE ACT IN CONTROVERSY UNCONSTITUTIONAL BY REASON OF ANY CONFLICT WITH SECTION 5219, REVISED STATUTES OF THE UNITED STATES?

"The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power."

(*Adams vs. Nashville*, 95 U. S, 22).

"The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from State legislation so far as the legislation may interfere with or impair efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States."

(9 Wallace, U. S. S. Ct., 362).

"It has never been held by this court that the State should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the National banks upon the shares of their stock in the hands of their owners.

"All that has been held necessary is, that the system of State taxation of its own citizens, of its own banks and of its own corporations, shall not work a discrimination unfavorable to the holders of the shares of National banks. Nor does the Act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits the *manner of assessing and collecting* all taxes, by the States, is uncontrolled by the Act of Congress."

(*Davenport Nat. Bank vs. Davenport Board of Equalization*, 123 U. S., 83).

The liberal construction of Section 5219, Revised Statutes, U. S., so clearly announced in the foregoing extracts, has been adhered to by this Honorable Court in an *unbroken line of decisions;* and we only ask that the same liberal construction be applied to this just revenue statute of the State of Kentucky (act of March 21, 1900).

Van Slyke vs. Wisconsin, 154 U. S., 581.
First Nat. Bank vs. Ayres, 160 U. S., 660.
Aberdeen Bank vs. Chihalis Co., 166 U. S., 440.
Merchants Bank vs. Penn., 167 U. S., 461.
Lander vs. Mercantile Bank, 186 U. S., 458.
Mercantile National Bank vs. New York, 121 U. S., 138.

It will be kept in mind that the restriction placed by Section 5219, Revised Statutes U. S., upon taxation of National bank shares by State authority is, "that the taxation shall not be at a greater rate than is assessed upon other monied capital *in the hands of individual citizens.*"

Congress, being aware that every State is always careful to guard the interests of her individual citizens, very properly selected the taxation of "individual citizens" as the standard by which to test the validity of taxation imposed by State authority upon National bank shares, knowing that, so long as that restriction be not violated, there could be no danger of any substantial discrimination against National bank shares (in the taxation thereof by State authority).

Did the mode of assessment of "monied capital in the hands of individual citizens" invested in State banks and institutions of loan or discount (in Keutncky from 1892 to 1900) discriminate against National bank shares? If it did, it also discriminated against "monied capital in the hands of individual citizens" *not thus invested,* and against all real estate and tangible property belonging to citizens of Kentucky.

Why would the Legislature of Kentucky discriminate in favor of "monied capital in the hands of individual citizens" that is invested in State banks and institutions of loan or discount against "monied capital in the hands of individual citizens" not so invested, and against all heal estate and all tangible personal property belonging to citizens of Kentucky?

The proposition that Article 3, Chapter 108, Kentucky Statutes, discriminated in favor of the property embraced thereby, has never been advanced. On the contrary, the evident purpose thereof was to prevent monied capital invested in corporations from escaping any part of the burden of taxation. Said article is well adapted to its purpose, and its practical operation has proven its efficiency in securing the assessment and just taxation of all forms of corporate property, including corporate franchises.

By said article, all tangible property of the corporation is left to be assessed and taxed as that of natural

persons, and the nominal "franchise" is made to include all intangible property of the corporation as well as its franchise proper. The value of the "franchise" (including all intangible property) is ascertained by first estimating the total value of the capital stock, and then deducting therefrom the assessed value of the tangible property. The mode of assessment insures the assessment and taxation of not only the "franchises" proper, but also the tangible and intangible property of the corporation, including all money, checks, notes, bonds, stocks, bills of exchange, accounts and choses in action.

In *Owensboro National Bank vs. City of Owensboro,* 173 U. S., 662-664, the bank vigorously contended that said article (Article 3, Chapter 108, Ky. Statutes), imposed a greater burden of taxation upon monied capital invested in all the banks than was imposed by laws of Kentucky upon "other monied capital in the hands of individual citizens," and was for that reason in conflict with both Section 5219, Revised Statutes, and the State Constitution. Now, herein the complainant bank's contention is directly the reverse. In that case the Supreme Court did not decide whether or not said contention was well founded in either particular, but placed its decision upon the ground that the State could not tax the franchises or property of National banks at *any rate.*

If said contention on part of the bank in that case was well founded, the complainant's contention herein is unfounded; because if said article then imposed a greater burden of taxation upon the property of corporations embraced thereby than was imposed by the laws of Kentucky upon the property of individual citizens, a less burden is imposed by the act of 1900 upon National bank shares than is imposed upon State banks.

If said Article 3 discriminated, substantially, either in favor of or against the individual citizen, the same would be in conflict with the State Constitution, and *pro*

tanto void. But the Kentucky Court of Appeals has held that there is no such discrimination in said article, and that the same is constitutional, in so far as the principle of equality in taxation is concerned (*Paducah Street Ry. Co. vs. The County of McCracken*, 20 Ky. Law Rep., 1294).

There being no discrimination by said article in favor of the property embraced thereby or against other property, it follows that the same did not discriminate against National bank shares, they being taxed as other property generally. Hence, the shares of stock in National banks in Kentucky were not taxed at "a greater rate" than "is assessed upon other monied capital in the hands of individual citizens." There was, therefore, no conflict between the revenue laws of Kentucky, as amended by the act in controversy, and Section 5219, Revised Statutes, U. S.

The Court of Appeals of Kentucky, after full consideration, has recently decided that the act of March 21, 1900, *did not discriminate against* the shares in National banks, and was not in conflict with Section 5219, Revised Statutes, U. S.

Commonwealth vs. Citizens Nat. Bank of Danville, and *Scobie, Sheriff, vs. Bean*, 22 R., 1079.

Citizens Nat. Bank of Lebanon vs. Commonwealth. (Decided April 27, 1904, and to be reported in Vol. 25 Ky. L. R., 2254).

In the last named cases the banks contended that the act of March 21, 1900, was repugnant to Section 5219, U. S. Statutes, because it permits an illegal discrimination against stock in National banks as compared with other monied capital in the hands of individual citizens, because National banks are of necessity owners of U. S. bonds exempted from all taxation (and no provision is

made in this act for the deduction of these bonds from assessed value of the shares).

This contention has long since been fully settled by this Honorable Court. We quote the head notes of two important decisions on this subject.

"A State possesses the power to authorize the

This argument that the Act of 1900, in question, discriminates against National Banks because it does not allow deductions for U. S. bonds. is based upon the mistaken assumption that State Banks in Kentucky are still taxed, under the former Statute on their franchises—which, as construed, is practically a tax on their property—and therefore State Banks owning U. S. bonds would be entitled to deduct them from their assessments when no such right is allowed National Banks under said Act of 1900.

But counsel, in this contention, wholly overlook the amendment to the former Revenue Statute providing that, in cities of the first, second and third classes in Kentucky State Banks shall be taxed on their shares—same as the shares of National Banks—(See Act of March 23d 1900, page 89, Session Acts, still in force) and therefore, neither State nor National Banks in Kentucky are entitled to any deductions of U. S. bonds owned by the bank, and hence there is no discrimination whatever.

Thus it will be seen that the act in controversy makes no discrimination *in law;* and it is not contended here there will be any discrimination *in fact;* and if there was any discrimination in fact under the operation of said statute, of course, the bank can and will be protected by pleading and proof against any such discrimination.

made in this act for the deduction of these bonds from assessed value of the shares).

This contention has long since been fully settled by this Honorable Court. We quote the head notes of two important decisions on this subject.

> "A State possesses the power to authorize the taxation of the shares of National banks in the hands of stockholders whose capital is wholly invested in stock and bonds of the United States under the Act of Congress of June 3, 1864. * * * The tax on the shares is not a tax on the capital of the bank, but upon a distinct, independent interest or property held by the shareholder."
>
> *Hammond vs. Commonwealth of Massachusetts, &c.*, and *Churchill vs. City of Utica* (bank tax cases), decided March 26, 1866 (Vol. 70, U. S.).

> "Tax on shares of a shareholder in a National bank is not illegal, because the tax commissioners, in the valuation of the shares, refused to deduct the amount of the capital of the bank invested in U. S. securities."
>
> *People vs. Commissioners,* decided January 7, 1867 (Vol. 71, U. S.).

As a matter of fact, however, the State banks in Kentucky do not own any U. S. bonds, because they are unprofitable as an investment.

> See also *First Nat. Bank vs. Ayres,* 160 U. S., 660.

Thus it will be seen that the act in controversy makes no discrimination *in law;* and it is not contended here there will be any discrimination *in fact;* and if there was any discrimination in fact under the operation of said statute, of course, the bank can and will be protected by pleading and proof against any such discrimination.

It would seem that the purpose of the bank is not so much to avoid a *discrimination* against its shares, as to avoid, by litigation and delays, the *payment of any taxes whatever.*

III.

The Alleged Contract of Exemption.

THE ESTOPPEL PROPOSED BY APPELLEE SHOULD NOT PREVAIL IN THIS COURT, BECAUSE THE SAME WOULD NOT PREVAIL IN THE COURTS OF KENTUCKY.

Remember, it is *now conceded* there never was any contract of exemption under the Hewitt Law, but it is claimed the contract was established by a judgment of the State court. Therefore, the only question is the effect of the State court judgment.

We are aware that a contract of immunity from taxes, although established only by a judgment relating to certain years' taxes, has been fully upheld as to other years' taxes by this Honorable Court (*New Orleans vs. Citizens Bank*, 167 U. S., 371), yet that was in a State (Louisiana) where the laws and usages as to the effect of the judgment were the same as in this Honorable Court, and the attention of the court was not specially directed to this question.

What effect as an estoppel should be given the judgment relied on by appellee herein?

In the case of *Mills vs. Duryee*, 7 Cranch, 484, this court, having under consideration the question above propounded, after discussing the constitutional provision and act of Congress on the subject, Justice Story delivering the opinion, said:

> "It remains only, then, to inquire in every case what is the effect of a judgment in the State where it

is rendered, * * * and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."

In the case of *Hampton vs. McConnell*, 3 Wheaton, 234, this court, Chief-Justice Marshall delivering opinion of the court, said:

> "This is precisely the same case as that of *Mills vs. Duryee*. The court can not distinguish the two cases. The doctrine there held was, that the judgment of a State court should have the same credit, validity and effect in every other court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States."

To the same effect is *McElmoyle vs. Cohen*, 13 Peters, 326; *Christmas vs. Russell*, 5 Wallace, 290; *Thompson vs. Whitman*, 18 Wallace, 457; *Phoenix Ins. Co. vs. Tennessee*, 161 U. S., 184; *Metcalfe vs. Watertown*, 123 U. S., 671; *Cooper vs. Newell*, 173 U. S., 555.

Besides, the same being a non-federal question, in which only citizens of Kentucky are concerned, this court will, for that reason alone, follow the State court decisions on that subject (*Phoenix Ins. Co. vs. Tennessee*, 161 U. S., 184; *Abraham vs. Casey*, 179 U. S., 218).

In a case which was decided in the Eighth Circuit, the learned judge rendering the decision, said:

> "The general rule is that the laws of the several States shall be regarded as rules of decision in the courts of the United States in cases to which they apply. The judiciary act requires this, and it would be the law independently of that enactment. Under this rule the first question which confronts the Federal Appellate Court is, What is the local law applicable to the case?

"The local law which forms the rule of decision may consist of a statute or of the decisions of its Supreme Court, or both," etc., etc.

Bergman vs. Bly, 66 Fed. Rep., 43.

"The inquiry is what is the settled law of the State at the time the decision is made? This constitutes the rule of property within the State by which the rights of the litigant parties must be determined As the Federal courts profess to be governed by this rule, they can never act inconsistently by enforcing it."

Lavin vs. Emigrant Sav. Bank, 1 Fed. R., 650.
Shelby vs. Gay, 11 Wheaton, 367.
Green vs. Neal's Lessees, 6 Pet., 299.

"The exposition given by the highest tribunal of the State," said Justice Shiras in a case involving the contention that a State statute impaired the obligation of a contract, "must be taken as correct, so far as contracts made under the act are concerned."

Morley vs. Lake Shore Ry. Co., 146 U. S., 166.

"It is a well-settled principle that the decisions of the State courts in the construction of a State constitution and laws are to be adopted by the Federal courts. This doctrine is established by numerous decisions."

Insurance Co. vs. Iron Co., 42 Fed. R., 376.

Further decisions upon this subject are as follows:

R. R. Co. vs. Blossburg et al., 20 Wallace, 137-143.
Bank vs. Bank, 136 U. S., 235.
Lawton vs. Young, 52 Fed. Rep., 439.
Sanford vs. Roe, 69 Fed. Rep., 546.
Bauserman vs. Blunt, 147 U. S., 647.
Thompson vs. Sawyer Co., 57 Fed. Rep., 1030.
Bergman vs. Bly, 66 Fed. Rep., 40.

Luther vs. Borden, 7 How., 1.
Lavin vs. Sav. Bank, 1 Fed. Rep., 641.
Christy vs. Pidgeon, 4 Wall., 196.
Leffingwell vs. Warren, 2 Black, 603.
R. R. vs. Trust Co., 82 Fed Rep., 124.
Hill vs. Hite, 85 Fed. Rep., 268.
R. R. Co. vs. Reed, 80 Fed. Rep., 234.
Rice vs. Adler, 71 Fed. Rep., 151.
Hodgson vs. Burleigh, 4 Fed. Rep., 121.
Durden vs. Malloy, 43 Fed. Rep., 407.
R. R. Co. vs. Guest, 84 Fed. Rep., 628.
Southerland vs. Village of Ernst, 86 Fed Rep., 597.

The Federal courts have repeatedly affirmed this doctrine, that on local questions they would follow the latest decisions of the State court, even though they overturned former decisions, *where no contract rights had been entered into upon the strength of the former adjudication.* And here permit us to direct attention to the fact that no contract rights whatever involved in this case have been entered into upon the strength of the alleged adjudication of 1895, for the charter involved here was accepted by the bank long before such decision, and could not possibly have been entered into upon any supposed rights fixed by that decision. It was not as if this decision had been read into its charter. The annulling of that decision did not violate any contract right obtained on account thereof.

> "The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *If the highest tribunal of the State adopt new views as to the proper construction of such statute and reverse its former decisions, this court will follow the latest settled adjudications.*"
>
> *Bauserman vs. Blunt*, 147 U. S., 654.

"It is well settled that these courts, in construing the statute laws of the several States, will follow the latest decisions of the court of last resort in the particular State whose statute is before the court for construction."

Thomas vs. Burney, 35 Fed. Rep., 115.

Under the Kentucky doctrine, there is no such thing as *res adjudicata* in tax cases, except for the particular taxes involved. This works no greater hardship upon the litigant than the rule limiting the judgment estoppel to the specific thing involved in matters other than taxes. The question is rather one of *stare decisis* than *res adjudicata,* and it has been said that "there is no vested right to claim the benefit of any particular decision of a court."

Talliaferro vs. Barnett, 47 Ark., 359.

We have, therefore, only to ascertain the effect as an estoppel given to such judgments, as that relied on by appellee herein, "by the courts, laws and usage of Kentucky. Would the same be a good plea of estoppel in the courts of Kentucky?

In the case of *City of Newport, &c., vs. Commonwealth,* 21 Ky. L R., 47 (decided April 26, 1899), the Kentucky Court of Appeals said:

"The only question remaining for decision is upon the plea of *res judicata.* The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. * * *

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judg-

ment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in *invitum*. The taxpayer does not agree to pay, but is forced to pay, and *the right to litigate the legality of a tax* UPON ALL GROUNDS *must of necessity exist, regardless of former adjudications as to the validity of a different tax.* * * *

"The decision of the Circuit Court as to the taxes for 1893 is not binding upon this court as to the taxes for subsequent years.

"It follows, therefore, that the judgment must be affirmed.

"The whole court sitting."

It matters not, therefore, *upon what ground* the exemption is claimed in a former suit—whether that of contract, or that the property is used for governmental purposes, or that it is exempted by statute, or that the exemption claimed is a vested or constitutional right—whatever the ground of exemption relied on and litigated in the former suit as to one year's taxes, the adjudication (according to the foregoing decision) is not conclusive as to the same matters of fact or law in a subsequent litigation between the same parties as to any other year's taxes.

The above doctrine, announced by the Kentucky Court of Appeals in 1899, in the foregoing case, has been uniformly adhered to by that court ever since, and has been reasserted by the same court in numerous cases between the date of said decision and the present time.

The next Kentucky case involving the same question was that of the *Louisville Bridge Co. vs. The City of Louisville*, 22 Ky. L. R., 703 (decided October 17, 1900), in which the Court of Appeals said:

> "In response to appellant's plea of *res judicata*, it may be said that this identical question was before the court in the case of *Henderson Bridge Co. vs. The City of Henderson*, decided June 24, 1896, and in the

very recent case of *Newport vs. Masonic Temple Co.*, 20 Ky. L. Rep., 266, and the *City of Newport vs. Commonwealth*, 21 Ky. L. Rep., 42. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year; and as the question is fully considered in these cases, it is unnecessary to elaborate it again."

On the same subject, in the case of *Negley, Sheriff, vs. City of Henderson*, 59 S. W., 19 (decided November 21, 1900), a Kentucky case, the Court of Appeals said:

> "This brings us to consider the question of *res judicata*. It was, in *City of Newport vs. Commonwealth, supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year."

The next case to same effect in Kentucky was that of *Bell County Coke & Improvement Co. vs. The City of Pineville*, 23 Ky. L. Rep., 933 (decided October 4, 1901). The substance of the decision is stated in the syllabus as follows:

> "A judgment enjoining the collection of a tax for one year does not prevent the collection of a tax for another year."

The opinion, after stating the case and coming to the plea of *res judicata*, said:

> "The case of the *City of Newport, &c., vs. Commonwealth*, 21 Ky. L. R., 42, is decisive of the question raised by the plea of *res judicata*."

The case of the *Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort*, 23 Ky. Law Rep., 1285 (decided on November 19, 1901), involved the same question. Exemption was claimed by the bank on

the ground of a former adjudication of contract in a litigation as to taxes for the years 1895, '6, '7 and '8. The court, holding the plea fo estoppel to be unavailable, said:

> "It is not necessary for the court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the Federal court proceeding. However, we do hold that the judgment of the Federal court is not a bar to a recovery of the taxes for the years 1893 and 1894.
>
> "This court, in *City of Newport vs. Commonwealth*, 21 Ky. Law Rep., 42; *Louisville Bridge Co. vs. City of Louisville*, 22 Ky. Lrw Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

The last named case was followed on December 19, 1901, by the case of *Lou. Bridge Co. vs. City of Louisville*, 65 S. W. R., 814. The plea of estoppel by *res judicata* was interposed as a ground of exemption. But the Court of Appeals (Ky.) said:

> "The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for us to consider this question: It having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes for one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's taxes" (the court here citing with approval the Kentucky cases on that subject above referred to in this brief).

There can be no doube, therefore, what effect as an estoppel the Kentucky Court of Appeals would give the judgment relied on herein by the appellee as an estoppel if this case wree pending in that court.

Viewed in the light of the Kentucky decisions alone, the same is not an estoppel in this case.

Hence, under the now well-established principle first announced in *Mills vs. Duryee*, 7 Cranch, and adhered to by this court ever since, the plea of estoppel by appellee is not available herein.

His Honor, Judge Cochran, concurs with the foregoing Kentucky decisions, dismisses complainant's petition as to years' taxes subsequent to the act of 1900 (and of course would have dismissed same as to all years not involved in the former decision, but for the fact that, through a sense of *judicial courtesy to Judge Evans, the decree* of the latter was permitted to stand undisturbed). (Record, page 101).

In case of the *Union & Planters Bank vs. The City of Memphis*, 111 Fed. Rep., 570, the U. S. Circuit Court of Appeals (Justice Lurton) says:

> "The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists, giving it immunity from the tax here involved, which judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and usage of that State, is not conclusive in respect of taxes assessed for other and subsequent years.
>
> "The exemption from the *ad valorem* taxation of its capital stock claimed in this suit *exists only*, if it exists at all, by reason of the conclusive character of the thing adjudged in the prior case. But if that judgment would not be conclusive in respect of taxes for other years in the courts of the jurisdiction in which it was pronounced, upon what principle does it become of any *greater efficacy*, when relied upon as *res judicata* in the courts of another jurisdiction?
>
> . . . . . .
>
> "Nor does any principle of general law or natural justice demand that any greater efficacy shall be accorded to a judgment of any State or foreign country, when either sued upon or pleaded as *res judicata*

in the courts of another jurisdiction than is accorded to it by the law or usage of the State or country from which the judgment comes. If such judgment be given the effect and conclusiveness accorded to it at home, every demand of the positive law, as well as of justice, has been answered.

"There is nothing which precludes this court from determining for itself whether the charter exemption claimed exists, to the extent of granting the appellant immunity from the *ad valorem* taxes assessed against its capital stock by the defendant City of Memphis, except the supposed conclusive effect of the thing adjudged in the prior case, which is relied upon as settling the question, without looking into the terms of the contractural exemption.

"Finding as we do that the judgment in the prior case is not under the law of Tennessee conclusive when the second suit is a demand for taxes of other years, subsequently assessed, and that in the courts of that State neither party could plead that judgment as a bar to a suit for taxes for other years, we are, therefore, not precluded from looking into the charter."

And the bank was required to pay the taxes to the City of Memphis, the following authorities being cited:

Hilton vs. Guyot, 159 U. S., 113.
Chicago & A. R. R. Co. vs. Wiggins F. Co., 108 U. S., 118.
Chase vs. Curtis, 113 U. S., 452.
Hanly vs. Donahue, 116 U. S., 1.
Renaud vs. Abbott, 116 U. S., 227.
Embry vs. Palmer, 107 U. S., 3.
Freeman on Judgments, Section 575.
Willis *Res Judicata,* Section 531.

There was no dissent from the above opinion by any justice in the Circuit Court of Appeals for the Sixth Circuit.

This same Memphis case was decided by this Honorable Court, after a full hearing, and the judgment of

the lower courts, requiring this bank to pay its taxes to the city, was affirmed, His Honor, Chief Justice Fuller, delivering the opinion, using this language:

> "It is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a State court shall have as *res judicata* is a question of State or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication."
>
> *Union & Planters Bank vs. City of Memphis* (decided April 13, 1903).

We need not say that the case at bar (being taxes for other years) *is precisely the same case* as the Memphis case, and we see no reason why we should continue to thresh over old straw by any further argument of this case.

We confidently rely upon Your Honors' decision in the last named case, as positively and necessarily conclusive of the case now presented by this Record.

THE JUDGMENT RELIED UPON AS RES ADJUDICATA, AND PLEADED AS AN ESTOPPEL HEREIN, IS NOT CONCLUSIVE OF THE FACTS AND LAW RAISED IN THE CASE AT BAR.

The particular matter in controversy in the adverse suit, and which resulted in the judgment, pleaded herein as *res adjudicata,* was the right of the City of Covington to assess a franchise tax against the First National Bank for the year 1893, amounting to $14,892.43. The right to collect this tax was asserted by the city, by virtue of the revenue act of 1892, which act empowered the municipality to collect a franchise tax against the bank. In said case the tax for one year, for 1893 only, was involved.

The prayer of the petition in said case was "that the defendant, its officers and agents be forever enjoined and restrained from attempting to distrain any of the plaintiff's property for said alleged tax claim of $14,892.43 or from attempting to collect same, or any part thereof, from this plaintiff, and that said claim be adjudged invalid." The tax for one year only was involved in said litigation. The right of the city to collect the franchise tax against said bank, under the act of the Legislature of Kentucky of November 11, 1892, was only involved in said litigation. There was no claim made by the bank in said case, and the court was not asked to enjoin the city from collecting any or all taxes against said bank. No such relief was asked for; no such relief was prayed for, and no such relief was granted. The Campbell Circuit Court which rendered the judgment relied upon herein as *res adjudicata*, could not, upon the facts alleged in the petition, adjudicate the right of the city to collect *ad valorem* taxes against the shares of stock of said bank, or any other tax that might in the future be assessed against said bank. The judgment of the court was "that the defendant City of Covington, its officers and agents, be and they are hereby forever enjoined and restrained from distraining, or attempting to distrain, any of the plaintiff's property for said tax claim of $14,892.43, in the petition herein set forth, and from attempting to collect same, or any part thereof, and that the plaintiff recover of the defendant the costs herein." (See page 27 of Record). In this case the court did find that the bank had a contract with the State which prohibited the defendant city from enforcing or collecting the franchise tax. The court further found "that the tax was not on the shares of capital stock, but that it was a tax on their franchise. National banks are the instrumentalities of the general government to provide National currency; to furnish the States with power to tax their franchise is to permit the States to

destroy this agency of the federal government to accomplish the purpose of that government." It will thus be seen the question asserted in said case and decided was, that the city had no power to collect a franchise tax against the defendant bank for the year 1893, because the bank had a contract with the State which prohibited the municipality from collecting such franchise tax against the bank, and that to permit the city to tax franchises of banks would be to destroy the agency of the federal government. The facts raised in said case, and the relief prayed for, as shown by the judgment relied upon herein (pages 25-6-7 of Record) are entirely different and distinct from the facts alleged and the relief prayed for in the case at bar.

The questions at issue in the case at bar are, the right of the municipality to assess the shares of stock of the National banks for taxes, under an act of the Legislature of Kentucky passed in 1900, long after the judgment relied upon herein as *res adjudicata* was rendered. The right of the city to assess and collect taxes against the shares of stock in said bank for the years 1894 to 1900 and subsequent years, is in controversy herein. The right of the city to collect this tax against the shares of stock of said bank should not be precluded by the judgment rendered in the adverse suit of January 31, 1894, because different questions, different facts, different circumstances, and different statutes are involved in the case at bar than were involved in the adverse proceeding. In the adverse suit, the right was asserted by the city to collect a franchise tax against said bank for the year 1893, under an act of the Legislature of Kentucky of 1892. In the case at bar the city is asserting the right to collect a tax against the shares of stock of the bank for the year 1894 and subsequent years, under an act of the Legislature of Kentucky of 1900. This right to collect a tax against the shares of stock of the bank under the act of 1900

was not raised, discussed or decided in the adverse suit. The judgment relied upon here as *res adjudicata* does not decide said question herein litigated; no such question was in issue in the adverse suit; no such question was raised, discussed or decided by the court in said adverse suit. This being true, the doctrine of *res adjudicata* should not apply here, and is no bar to the right of the city to proceed to collect the present tax in controversy. The doctrine is elementary and fundamental, that a plea of *res adjudicata* will not be held good or conclusive in a subsequent proceeding against the same parties, where the questions, issues, facts and circumstances are not the same in the subsequent proceedings as in the former. The judgment relied upon herein as an estoppel does not attempt to enjoin or restrain the city from assessing and collecting a tax upon the shares of stock of the bank. The judgment only enjoins the defendant city from assessing or attempting to collect a franchise tax against the capital stock of the bank. The court, in the judgment of 1894, pleaded as *res adjudicata* herein, did not and could not go so far as to enjoin the city from collecting any and all taxes that may at any time in the future be assessed against said bank under State legislation. The court could not do this in said litigation, and did not do it, because, by the act of 1900, municipalities have been given the right to assess and collect *ad valorem* taxes against the shares of stock of National banks, and this act has been held valid and binding by the highest court in the State of Kentucky, and not in violation of the alleged contract which the bank herein is asserting, by reason of the Hewitt Act, passed by the Legislature of Kentucky in 1886, the terms and provisions of which were accepted by the bank in this litigation.

This reasoning and doctrine has been sustained by this court in numerous decisions, and especially in the case of the *City of New Orleans et al. vs. Citizens Bank*

of Louisiana, reported in 167 U. S., page 371, etc., wherein this court held and decided in part as follows:

"The only question, then, remaining to be determined is, to what subjects of taxation does the estoppel of the thing adjudged apply, for it extends only to matters which are necessarily concluded by the judgment. It is clear upon the face of the record and judgment which are relied upon to constitute *res adjudicata,* that the only questions therein presented and decided were the non-liability of the bank for taxation on its capital, its banking house and furniture acquired for the purposes of its banking houses, and to a tax levied *co nomine* on its shareholders, with obligation imposed by the tax law on the bank to pay the tax. These items, however, embrace only the subjects of taxation mentioned in the first of the enumerations which we at the outset made, and did not include the objects embraced in the other three. The thing adjudged, therefore, on the face of the records and judgments does not include three of the general subjects of taxation, as the judge of the court below decreed the bank not liable for taxation. The argument, however, is that, although the objects embraced in the last three headings are not apparently within the estoppel resulting from the thing adjudged, they are nevertheless substantially so, for it is said as the thing adjudged determined that the bank under its contract can not be taxed, the principle thus established carried the other items with it. The contention is unsound, and to demonstrate that it is, we will examine briefly the three items referred to, which are embraced in the second, third and fourth headings. They are as follows:

"Second. 'That the stockholders of the bank are not liable for assessment upon their shares of stock.' *The doctrine that an exemption of the capital of a corporation does not of necessiay include the exemption of the shareholders on their shares of stock is now too well settled to be questioned."* (Our italics).

The Bank of Memphis vs. Tennessee, 161 U. S., 134; 163 U. S., 416.

"Third. 'That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions or stock loans and had become the property of the bank under foreclosure proceedings, because property so acquired became, by virtue of the purchase by the bank, a part of its capital stock.' The argument by which it is asserted that this right is embraced within the contract, and, therefore, is governed by the thing adjudged, may be thus briefly stated. The thing adjudged, it is said, establishes that the capital of the bank is non-taxable, and, where the capital can not be taxed, that in which the capital is invested becomes a part of the capital, and therefore can not be taxed, and authorities are cited which it is claimed support this proposition." This claim was also rejected by the court.

"Fourth. 'That the non-liability of the bank for taxation, embraced also immunity from the payment of a license tax to either the State of Louisiana or the City of New Orleans.' *We are at a loss to understand by what process of reasoning the decree was made to cover the question of the non-liability of the bank for license. It was not presented by the pleadings, and was entirely dehors the issue in the case.*" (Our italics.)

The court in conclusion in this case held that the decree below was in part erroneous, and reversed it, holding as follows:

"The decree below is therefore reversed, and the case remanded, with the following directions: First, to enter a decree in favor of the Citizens Bank, recognizing and enforcing its non-liability to taxation, State, parochial and municipal, on its capital stock, its banking house and furniture acquired for the purposes of its banking business, and on a tax on its shareholders *co nomine,* accompanied with a legal

obligation on the bank to pay the tax. Second, rejecting the claim of the bank to non-liability of its shareholders for taxation, without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them, unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana. Third, rejecting the claim of the bank to non-liability to taxation on the property acquired by it under foreclosure *of mortgage*—the whole without prejudice to the right of the State and municipal authorities to claim a license tax, should such be imposed by law upon the bank, and without prejudice to the right of the bank to assert any legal defenses which it may have to the payment of such license tax, and it so ordered."

It is thus in the case at bar. The decree of 1894 of the Campbell Circuit Court, as affirmed by the Court of Appeals of Kentucky in 1895, and relied upon as *res adjudicata* herein, did not cover the question of the non-liability of said bank for a tax upon the shares of stock of said bank; it was not presented by the pleading in said case; it was not male an issue in said case, and the judgment of the court relied upon does not attempt to decide said question. This being true, the question is an open one in the present case, and the right of the city to assess and collect a tax against the shares of stock of the defendant First National Bank, is not precluded by either of said judgments, and is an open question. The case at bar is analogous in many respects to the case of the *Union and Planters Bank of Memphis vs. City of Memphis* (decided April 13, 1903, by this court, and reported in 189 U. S., page 72, etc.), wherein this court refused to sustain the plea of *res adjudicata* set up by the bank. If anything, the case at bar presents a much stronger aspect in favor of the right of the city to collect the tax in controversy than in said Memphis case. In the Memphis case aforesaid the bill was filed by the State of Tennessee on behalf

of the City of Memphis, to recover of the Union and Planters Bank *ad valorem* taxes on its capital stock for the years 1887 to 1891, inclusive; or in the alternative, to recover from the stockholders of the bank the same amount as taxes on the shares of stock held by them respectively during these years. A demurrer was sustained and the bill dismissed. The Supreme Court of Tennessee, in deciding said case, rendered the following judgment on June 7, 1902, and reported in 91 Tennessee, 548:

> "The State was bound by its contract, and so likewise is the City of Memphis. This is true not only as to privilege taxes, but also with respect to other tax claims in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality. As to those subjects, the specified tax is in lieu of all other taxes, State, county and municipal. Such is the undoubted meaning of the contract."

This judgment of the Supreme Court of Tennessee was pleaded as *res adjudicata* by the bank, and relied upon by it as an estoppel against the right of the City of Memphis to collect further taxes against said bank. This court, in rendering judgment in the aforesaid case, refused to sustain said plea of *res adjudicata*, and held that it only applied to the taxes actually in litigation, and was not conclusive in respect to taxes assessed for other and subsequent years, holding, further, "that inasmuch as what effect the judgment of the State court may have as *res adjudicata* is a question of State or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication." Citing *Phoenix Fire Insurance Co. vs. Tennessee,* 161 U. S., 174.

In the case at bar, the judgment relied upon as *res adjudicata* to defeat the taxes in controversy, enjoined the city from collecting only a franchise tax against the

capital stock of the bank for the year 1893. This is the only tax that was in controversy in said suit, and the only question decided by the judgment in said case. The judgment does not prohibit the right of the city to collect a tax against the shares of stock of said bank, as was raised in the Memphis case and as adjudged in said case. This case, then, presents itself to the court in a much stronger aspect than the Memphis case, and is only suggested herein as a stronger reason why the judgment relied upon herein is not and should not be held to be conclusive of the right of the city to assess and collect taxes against the shares of stock of the bank herein.

I believe this court will hold as it did in the Memphis case, "that inasmuch as what effect the judgment of the State court will have as *res adjudicata*, is a question of State or local law," and that the taxes involved in this suit are taxes for years other than those involved in the prior adjudication, and as the Court of Appeals of Kentucky has frequently held and decided, that the plea of *res adjudicata* is only applicable to the taxes actually in litigation; that, therefore, the Memphis case is controlling and decisive of the case at bar.

Deposit Bank vs. Board of Councilmen of Frankfort (decided December 14, 1903).

The decision of this Honorable Court in the abovementioned cause is not inconsistent with the decision in *Union and Planters Bank vs. Memphis* (decided April 13, 1903), and has *no application to the case at bar*, because the effect of the judgment considered in said Deposit Bank case was *a judgment of the United States Circuit Court for the District of Kentucky*, whereas the judgment now pleaded as an estoppel in this case is *a judgment of the Campbell County Circuit Court of the State of Kentucky* (Record, page 27).

In the Deposit Bank of Frankfort case, the *dis-*

tinction between the effect of a Federal court judgment and a State court judgment (when considered by this court) is *so clearly and strongly drawn and pointed out,* that we need only to call Your Honors' attention to the same, without attempting to elaborate the reasons for the distinction in this brief. We quote from the language of the opinion of the court (delivered by Justice Day) in said Deposit Bank case:

> "In this case we have to deal with the effect of a decree of the Circuit Court of the United States which is unreversed and affirmed in this court, and in which, between the parties to the present action, it was held that the Hewitt Law was a valid enactment and constituted a contract between the parties within the protection of the contract clause of the Constitution of the United States. * * *
>
> "It is urged that the State judgment upon which the Federal decree of 1898 is based, was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question is not what were *the reasons* upon which the judgment proceeded, but what was the judgment itself? Was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? * * *
>
> "In every other forum the reasons for passing the decree are wholly immaterial, and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, *in the court of its rendition,* to modify it or set it aside." * * *

So it will be seen that the sharp issue in the Deposit Bank of Frankfort case, in the argument between the majority of this Honorable Court (speaking through Justice Day) and the minority (speaking through Chief-Jus-

tice Fuller) was not whether this court will give the same effect to a judgment of a State court as is given same by the laws and usage of that State (this was not disputed and not discussed); but the question was (when a judgment of a Federal court is based entirely on a judgment of the State court, which has afterwards been reversed), whether this court should still rigorously adhere to the Federal court judgment, treating the State court judgment as *merely the reason* for the Federal court judgment, and, therefore, ignored? (Some of the counsel in the present case represented the city of Frankfort in Deposit Bank case, and then urged the same views so ably presented by the minority opinion (Justice Fuller), yet we are compelled to recognize the force of the distinction made between the effect of a Federal and a State court judgment.)

Referring to the Union Planters Bank case, *supra*, His Honor, Justice Day (in deciding the Deposit Bank case), uses this language:

> "It was held that the Federal courts were not required to give such domestic judgments any greater force and effect than was awarded them by the courts of the State where rendered.
>
> "But it is equally well settled that a right claimed under the Federal Constitution, finally adjudicated in the *Federal courts*, can never be taken away or impaired by State decisions. The same reasoning which permits to the States the right of final adjudication upon purely State questions requires no less respect for the final decisions of the Federal courts of questions of National authority and jurisdiction."

With great confidence we earnestly ask this Honorable Court to reverse the judgment and permit the City of Covington to enforce the act of March 21, 1900, by collection of so much of the taxes due from the First

National Bank of Covington as is not already barred by limitation.

Respectfully,

F. J. HANLON,
J. H. HAZELRIG,
IRA JULIAN,
Counsel for City of Covington, Ky.

POINTS AND AUTHORITIES.

I.

The act of March 21, 1900, providing for taxation of shares of National banks is not repugnant to Section 5219, Revised Statutes U. S., because of its retroactive provision.

Kentucky Statutes, Chapter 108.
Owensboro Nat. Bank vs. City of Owensboro, 173 U. S.
Act March 21, 1900.
Board of Councilmen vs. Mason & Foard Co., 100 Ky. R., 48.
Blackwell on Tax Titles (5th Ed.), Sections 324-327.
Kentucky Statutes, Sections 3176-3375, 4020, 4022, 4090, 4241.
Constitution of Kentucky, Sections 170, 171, 172, 174.
Scobee, Sheriff, vs. Bean, 22 Ky. L. R., 1076.
City of Chester vs. Black, (Pa.), 6 L. R. A., 802.
Butler vs. City of Toledo, 5 Ohio State, 225.
Mills vs. Charleston, 29 Wis., 400.
Marion Co. vs. L. & N. R. R. Co., 91 Ky. R., 388.
In Re Van Antwerp, 56 N. Y., 261.
L. & N. R. R. Co. vs. Com., 1 Bush. Ky. R., 250.
Long vs. Kiende, 27 Hun., 66.
Mattingly vs. Dist. Columbia, 97 U. S., 687.
Plummer vs. Marathon Co., 46 Wis., 104.
Florida Cen. & Pen. R. R. vs. Reynolds, 183 U. S., 471.
Cooley on Taxation, 309.
Mercantile Nat. Bank vs New York, 121 U. S., 138.
Lou. & Jeff. Ferry Co. vs. Com., 22 Ky. L. R., 446.
Com. vs. Citizens Nat. Bank of Danville, and *Citizens Nat. Bk. of Lebanon vs. Com.* (decided April 27, 1904, and to be reported in Vol. 25, Ky. L. R., 2254).
Town of London vs. Hope, 26 Ky. L. Rep., 112.
Cooley on Taxation, 2d Ed., 291.

II.

The act in controversy is not unconstitutional by reason of any conflict whatever with Section 5219 U. S. Statutes.

Adams vs. Nashville, 95 U. S., 22.
Bank vs. Com., 9 Wallace, 362.
Davenport Nat. Bank vs. Davenport, &c., 123 U. S., 83.
Van Slyke vs. Wisconsin, 154 U. S., 581.
First Nat. Bank vs. Ayres, 160 U. S., 660.
Aberdeen Bank vs. Chihalis Co., 166 U. S., 440.
Merchants Bank vs. Penn., 167 U. S., 461.
Mercantile Nat. Bank vs. New York, 121 U. S., 138.
Lander vs. Mercantile Bank, 186 U. S., 458.
Scobee, Sheriff, vs. Bean, 22 R., 1079.
Commonwealth of Ky. vs. Citizens Nat'l Bank of Danville; Citizens National Bank of Lebanon vs. Com. (decided April 27, 1904, and to be reported in Vol. 25, Ky. L. R., 2254).
Hammond vs. Com. of Massachusetts, &c., and *Churchill vs. City of Utica* (bank tax cases), (decided March 25, 1866 Vol. 70, U. S.).
People vs. Com'rs (decided January 7, 1867), (Vol. 71, U. S.).

III.

THE ALLEGED CONTRACT OF EXEMPTION.

The estoppel proposed by the bank should not prevail in this court because the same would not prevail in the courts of Kentucky.

Section 905, U. S. Statutes.
Mills vs. Duryee, 7 Cranch, 484.
Hampton vs. McConnell, 3 Wheaton, 234.
McElmoyle vs. Cohen, 13 Peters, 326.
Christmas vs. Russell, 5 Wallace, 290.
Thompson vs. Whitman, 18 Wallace, 457.
Phoenix Ins. Co. vs. Tenn., 161 U. S., 184.

Abrahams vs. Casey, 179 U. S., 218.
City of Newport vs. Com. of Ky., 21 Ky. L. R., 47.
Metcalf vs. Watertown, 153 U. S., 671.
Lou. Bridge Co. vs. City of Lou., 22 Ky. L. R., 703.
Negley, Sheriff, vs. City of Henderson, 59 S. W. R., 19.
Bell Co. Coke Co. vs. City of Pineville, 23 Ky. L. R., 933.
Cooper vs. Newell, 173 U. S., 555.
Union Planters Bank vs. Memphis, 111 Fed. R., 570.
Same vs. Same, in U. S. S. Ct., decided April 13, 1903.
Hilton vs. Guyot, 159 U. S., 113.
Chicago & A. R. R. Co. vs. Wiggins F. Co., 108 U. S., 118.
Chase vs. Curtis, 113 U. S., 452.
Renaud vs. Abbott, 116 U. S., 227.
Embry vs. Palmer, 107 U. S., 3.
City of New Orleans vs. Citizens Bank of Louisiana, 167 U. S., 371.
Freeman on Judgments, Section 576.
Wills' Res Judicata, Section 531.
Deposit Bank of Frankfort vs. Bd. of Councilmen of Frankfort, decided Dec. 14, 1903.
Bergman vs. Bly, 66 Fed. R., 43.
Lavin vs. Emigrant Sav. Bank, 1 Fed. R., 650.
Shelby vs. Gay, 11 Wheaton, 367.
Green vs. Neal's Lessees, 6 Pet., 299.
Morley vs. Lake Shore Ry. Co., 146 U. S., 166
Insurance Co. vs. Iron Co., 42 Fed. R., 376.
R. R. Co. vs. Blossburg et al., 20 Wallace, 137-143.
Bank vs. Bank, 136 U. S., 235.
Lawton vs. Young, 52 Fed. Rep., 439.
Sanford vs. Roe, 69 Fed. Rep., 546.
Bauserman vs. Blunt, 147 U. S., 647.
Thompson vs. Sawyer Co., 57 Fed. R., 1030.
Bergman vs. Bly, 66 Fed. R., 40.
Luther vs. Borden, 7 How., 1.

Lavin vs. Sav. Bank, 1 Fed. R., 641.
Christy vs. Pidgeon, 4 Wall., 196.
Leffingwell vs. Warren, 2 Black, 603.
R. R. vs. Trust Co., 82 Fed. R., 124.
Hill vs. Hite, 85 Fed. R., 268.
R. R. Co. vs. Reed, 80 Fed. R., 234.
Rice vs. Adler, 71 Fed. R., 151.
Hodgson vs. Burleigh, 4 Fed. R., 121.
Durden vs. Malloy, 43 Fed. R., 407.
R. R. Co. vs. Guest, 84 Fed. R., 628.
Southerland vs. Village of Ernst, 86 Fed. R., 597.
Bauserman vs. Blunt, 147 U. S., 654.
Thomas vs. Burney, 35 Fed. R., 115.
Talliaferro vs. Barnett, 47 Ark., 359.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

The City of Covington, Kentucky, and John H. MacDonald, Assessor of the City of Covington, Appellants,

vs.

The First National Bank of Covington, Appellee.

The First National Bank of Covington, Kentucky, Appellant,

vs.

The City of Covington, and John H. MacDonald, Assessor of the City of Covington, Kentucky, Appellees.

PETITION FOR RE-HEARING.

P. J. HARLOW,
J. H. HAZELRIG,
WM. JULIAN,
Counsel for the City of Covington.

Supreme Court of the United States

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MEDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, *Appellants*,

vs.

THE FIRST NATIONAL BANK OF COVINGTON *Appellee*,

AND

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, *Appellant*,

vs.

THE CITY OF COVINGTON AND JOHN N. MEDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KENTUCKY, *Appellees*.

Nos. 113-114

PETITION FOR RE-HEARING.

To the Honorable the Supreme Court of the United States;

Your petitioners, the City of Covington and John Middendorf, Assessor, now come and respectfully beg this Honorable Court to grant them a rehearing and modification of the able opinion rendered herein on the 17th day of April, 1905 (and wherein Case No. 113 was affirmed), for the following reasons:

After succinctly, and clearly, reviewing the various decisions relative to taxation of National Banks in Kentucky, and sustaining fully all the contentions of the

City of Covington herein, *with a single exception*, Your Honors, in conclusion, say:

> "Without considering the question of constitutional power to tax non-resident shareholders by means of this retroactive law, it seems to us that in imposing upon the bank liability for the past years, for taxes and penalty, upon stock held *without the state*, and which, before the taking effect of the act under consideration, it was not required to return, there has been imposed upon National Banks, in this retroactive feature of the law, a burden not borne by other moneyed capital of the state. This law makes a bank liable for taxes upon property beyond the jurisdiction of the state, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in Section 5219 (U. S. Stats.), thus imposing a burden not borne by other moneyed capital within the state.
>
> "We think the Circuit Court was right in that part of the decree which enjoined the collection of taxes against the bank for the years 1893 to 1900 inclusive."

Thus it will be seen the sole ground for affirming the judgment, enjoining the collection of the *entire taxes* due the city from 1893 to 1900 (on the shares of *resident* as well as *non-resident* shareholders) is, that *so much* of the act as made the bank liable for tax and penalty on the shares of non-resident owners imposed on the bank a burden not borne by other moneyed capital within the state. Therefore, only *so much* of the act of March 21, 1900, as makes the bank liable for taxes of shareholders "beyond the jurisdiction of the state" is within the pur-

view of Your Honors cogent argument and reasons for holding the act invalid and enjoining the collection of taxes due the city from 1893 to 1900; and we now beg to suggest that an affirmance and injunction against collection of all taxes prior to 1900 against *all* the shareholders is too broad in its effect, because that part of the act providing for collection of taxes on the shares of resident owners is *wholly free from the only objection urged against the enforcement of the act*, viz., that the bank is made liable for (non-residents' tax and penalty) a burden not borne by other moneyed capital within the state, contrary to Section 5219 (U. S. Statute).

So the only remaining question is, whether a revenue statute which is only invalid in part (as to the tax on a separate well defined character of personal property, belonging to non-residents of the state) should be declared wholly inoperative and unenforceable as to the entire tax, provided for by the act, against the property of resident owners which is wholly free from the only objection urged against the validity of the statute?

We earnestly insist that because the statute is repugnant to Section 5219 *in part*, as to a particular class of property (non-resident shares), it should not be held void *in toto;* because the valid and enforceable provisions are *"separable"* from the invalid part of the act.

The rule is too well settled to justify any discussion, further than a simple statement of same, that:

Although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained by the courts where it can be *separated* from that which is void.

Packet Co. v. *Keokuk*, 95 U. S., 80;
Presser v. *Illinois*, 116 U. S., 252;
Field v. *Clarke*, 143 U. S., 649;
Dundee Co. v. *School Dist.*, 21 Fed., 151.
Appeal of Fox, 12 Pa., 337;
In re Tax Assessment, 4 S. D., 6;
Burkholz v. *State*, 84 Tenn., 71;
Gale v. *Owen Co.*, 83 Ky., 61;
Duke v. *O'Brien*, 100 Ky., 710.

Now, since the act of March 21, 1900, can not be enforced in so far as the shares of non-resident owners is concerned, this should in no wise interfere with the assessment and collection of taxes under the act on the shares owned by residents of the state, just as other delinquent taxes are collected in the state of Kentucky.

If the State Legislature has, by accident, failed to provide an effective statute for taxation of the National Bank shares of non-resident owners this does not discriminate against the bank, or the resident shareholders, who are liable for their taxes, any more than a failure to provide for taxation of any other property of non-resident owners.

The interest of each shareholder is as separate and distinct property of the owner thereof as any other species of personal property subject to taxation. The law imposing the tax is a general statute, applying alike to all personal and real property in the state, and the rate of tax is the same. Then how does the enforcement of the valid portion of this act operate to impose a greater burden either on the National Bank or on the resident shareowners than is imposed in Kentucky on other moneyed capital in the hands of individual citizens?

Under our present Kentucky statute of limitation no assessment of taxes can be enforced for more than five years prior to the assessment. Therefore the retroactive portion of the act of March, 1900, *can not operate as a serious hardship* upon the resident share owners, or the bank. All the state banks, and resident shareholders in nearly all the national banks in Kentucky, have paid local taxes for the years in question. Why should this bank complain of the enforcement of the valid portion of this act? Besides, if permitted to require an exhibit of same, it would appear that the actual number of shares of this bank owned by non-residents of Kentucky is *so small* as to amount to nothing practically. Moreover, the present revenue law of Kentucky requires all the national banks to list and pay the taxes on all shares—those owned by resident as well as non-resident shareholders—and, therefore, if the entire statute is inoperative as to delinquents because of this feature in the law, then Your Honors' opinion, in this case, will be far-reaching in its effect in Kentucky.

(See Act March 21, 1904.)

Since the order in this cause, under the opinion, must be an *affirmance*, which precludes any enforcement of the valid provisions of the act of March 21, 1900, or collection of any taxes due the City of Covington for years prior to 1900, *even as against resident shareholders*, and must also operate to interfere with the collection of all delinquent taxes from national banks under the Kentucky Statutes, we earnestly pray this Honorable Court to grant a rehearing, reversal of the circuit court decree, and modification of the recent opinion herein, with such

directions as may please Your Honors to effectuate the valid provisions of the Act of March 21, 1900.

Respectfully,

IRA JULIAN,

F. J. HANLON,

J. H. HAZELRIG,

Attorneys for the City of Covington.

We certify that the foregoing petition for rehearing, and modification of the opinion herein, is in our opinion well founded, and is not made for the purpose of delay.

IRA JULIAN,

F. J. HANLON,

J. H. HAZELRIG.

FILE COPY.

Office Supreme Court
FILED
DEC 3 1
JAMES H. McKENN

Supreme Court of the United States.

OCTOBER TERM, 1904.

Nos. 113, 114.

No. 113

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, Assessor of the City of Covington, Ky., ... *Appellants,*

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, ... *Appellee.*

No. 114

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, ... *Appellant,*

vs.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, Assessor of the City of Covington, Ky., ... *Appellees.*

BRIEF FOR FIRST NATIONAL BANK.

JAMES S. PIETLE,
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ATTILLA COX, JR.,
Of Counsel.

SHELLEY D. ROUSE,
EDMUND F. TRABUE,
For First National Bank.

Supreme Court of the United States

OCTOBER TERM, 1904.

NO. 113

CITY OF COVINGTON, KENTUCKY, and JOHN N. MIDDENDORF, Assessor of the City of Covington, Ky., - - - Appellants,

V.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Appellee.

NO. 114

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Appellant,

V.

CITY OF COVINGTON, KENTUCKY, and JOHN N. MIDDENDORF, Assessor of the City of Covington, Ky., - - - Appellees.

STATEMENT.

These appeals are from a decree of the Circuit Court of the United States, Eastern District of Kentucky.

The city's and its assessor's petition and assignment of errors are found, *Rec., pp. 101, 104,* and the bank's petition and assignment of errors, *pp. 107, 108.*

The decree appealed from was entered on June 16, 1903, *Rec. pp. 102, 103.*

The bank filed its bill of complaint against the city and its assessor July 23, 1900, (*Rec., p. 1*), which, by permission, was amended on August 14, 1900 (*Rec, p. 33*), seeking to enjoin the city and its officers from assessing or attempting to collect taxes on the shares of the capital stock of the bank, for the years from 1893 to 1900, both inclusive, and from arresting the bank's president and cashier, as threatened, for not listing such shares of stock for assessment,

and for an adjudication whether such shares of stock were subject to taxation by the State before November 17, 1904, the time of the expiration of the bank's charter.

As an exhibit with the bill is filed the bank's acceptance of the "Hewitt Law," hereinafter explained (*Rec. pp. 15, 22*); and the record from the Campbell Circuit Court in the bank v. The City, wherein the contract between the bank and the State, providing the sole method of the bank's taxation, was adjudicated. (*Rec., p. 15.*)

The city and its assessor demurred generally to the bill, and the answer filed was stricken from the record, so that every allegation of the bill is confessed. It is accordingly admitted of record, that appellant bank is a National bank, incorporated November 17, 1884, for the term of twenty years, ending November 17, 1904, located always in Covington, Kentucky. That in December, 1886, the legislature of Kentucky enacted the "Hewitt Law" for the taxation of all banks in Kentucky, and provided for a contract between the State and the banks, State and National, stipulating:

> "That shares of stock in State and National banks * * * shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation as is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

Further:

> "That nothing herein contained shall be construed as exempting from taxation for county or

municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of said act provided:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky, shall be evidenced by writing under the seal of such bank, and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock, shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

That the bank, on June 22, 1887, within the time allowed, filed with the governor the required acceptance of act: That its cashier, on July 1st of each year thereafter, including 1900, filed with the State Auditor the statement required by *Section 2* of the act, and the bank has paid the tax of *seventy-five cents* on each share of its stock, as provided in said act, to the State of Kentucky for every year including 1900, and to date so far as anything appears in this record to show the contrary, which tax the State accepted and has retained. It has, also, every year paid to the city of Covington taxes for municipal purposes assessed by said city on its banking building:

That the contract between the State and the bank, when

made, was authorized by the State Constitution. The State, however, on *September 28, 1891*, adopted a new Constitution, inconsistent with such contract or the law authorizing it:

That in 1892, five years after the contract aforesaid was made, the Legislature enacted the Revenue Law of the State, providing, among other things, that each bank should pay a franchise tax, which, as construed by the highest court of Kentucky and by this court, included the entire value of the bank's capital stock, surplus, etc., less the assessed value of its tangible property, otherwise taxed. *Citizens, etc., Bank v. Owensboro, 173, U. S., 636:*

That pursuant to the new legislation appellant bank's property was so assessed for the year 1893 for taxation by the appellant city, the tax being denominated a "franchise tax." The bank insisted that its aforesaid contract with the State, made in June, 1887, under the Hewitt Law was irrevocable, and that all of its property, other than its banking building was exempt from any taxation by appellant city before November 17, 1904, the termination of its corporate existence, and the city contended that such contract had been abrogated by the act of 1892, and that the bank's shares of stock and property were subject to taxation for municipal purposes, and that it could collect the tax assessed for 1893, called a "franchise tax," and threatened to distrain the bank's property therefor; whereupon, the bank filed in the Kenton Circuit Court its petition against said city, alleging its contract under the Hewitt Law, and its compliance therewith ever thereafter; the attempted repeal of said law by the State in 1892, assailing the attempt as an impairment of the obligation of its contract with the State, and praying an injunction restraining the city from collecting, or attempting to collect said tax for said year 1893; and the judge of the court declining to sit by reason of personal interest in the result, the case, by agreement, was transferred to the Campbell Circuit

Court, a court of like jurisdiction with the Kenton Circuit Court. The city demurred to the bank's petition, its demurrer was overruled, the facts being correctly averred in the petition it declined to answer, and, thereupon, the court adjudged that the contract aforesaid between the State and the bank, exempting its shares of stock from any local taxation whatever, was irrevocable during the corporate existence of the bank, and the injunction as prayed was granted: (*Rec., p. 27.*)

That from the judgment, the city appealed to the Court of Appeals of Kentucky, which affirmed said judgment, specifically and unequivocally adjudging the existence and irrevocability of the contract aforesaid, and that by reason thereof all the property of the bank, other than its banking building, and all of its shares of capital stock, were exempt from taxation by said city during the corporate existence of the bank. Appellant bank has complied with said adjudged contract ever since:

That on *March 21, 1900,* the Kentucky legislature enacted the law now in controversy. That this act attempted to authorize the assessment, for both State and municipal purposes, of stock of National banks for each and every year since *1892, and to make the bank liable for the tax.*

That appellant bank's capital stock during *1893, 1894, 1895, and 1896,* and until *July 1, 1897,* was $600,000.00, and upon that day it was diminished to $300,000.00, and said bank then paid to the persons then holding its shares of stock $300,000.00 in money. That from *1893* to the *institution of this action,* many of the shares of the bank's stock had changed ownership, many being transferred, and many having passed upon the death of the holders thereof to personal representatives, and been distributed among distributees, or sold to pay decedent's debts, and that many of said shareholders from time to time were non-residents of Kentucky, some selling and transferring

their stock, others becoming insolvent, so that their stock passed in payment of indebtedness.

That in *May, 1900*, appellant, Middendorf, the city's assessor, demanded of the appellant bank that it list with him for taxation by said city for all the years from *1893 to 1900*, both inclusive, all the shares of its capital stock, in response whereto said bank's Board of Directors adopted a resolution, directing its president and cashier not to make the list demanded, for the reason that such shares were not subject to taxation by said city, and that it had been accordingly so adjudged. (*Exhibit C, Rec., p. 29.*) That said assessor then served on the president, a written notice to list with him said shares for taxation for all of said years (*Exhibit D, Rec., p. 29*), and upon the bank's refusal said assessor and city threatened to and were about to procure the arrest and punishment of said president and cashier, to compel by process of contempt from the police court of said city, the listing of such shares for taxation as aforesaid, the power so to proceed being claimed under Kentucky Statutes governing *cities of the second* class, and especially *Sec. 3179, Ky. Stats.* (*Rec., p. 11.*)

That after the Act of March 21, 1900, became effective, *to-wit* in *July, 1900*, the date for payment of the bank's taxes under its contract of June, 1887, the State of Kentucky collected from and still retains the tax provided for in said contract. (*Rec., p. 5.*)

That the bank's bill of complaint averred the facts aforesaid, and exhibited a complete transcript of the record in the action aforesaid in the Campbell Circuit Court, and upon consideration thereof, the court below granted the bank an injunction *pendente lite*, restraining the city and its assessor from making, either against the bank or any holder of its shares of capital stock, any assessment or levy of any tax upon said shares of stock for any purpose for any time previously to *March 21, 1900*, and, also, from collecting any tax upon such shares upon any assess-

ment or levy for any time subsequently to said date, but provided that said defendants were left at liberty to make assessments of said shares for taxation for any time or period after *March 21, 1900*, provided that they made no collection of the taxes so assessed until said court should have determined from the evidence whether the taxes so assessed were at a higher rate than permitted by law, and to what extent (*Rec., p. 62*). Afterward, to-wit, on *December 17, 1900*, the parties entered into a stipulation (*Rec., p. 63*) and thereupon the case was submitted as upon final hearing, and a decree entered (*Rec., p. 65*). Said decree disallowed the plea to the jurisdiction of the court; and overruled the demurrer to the bill, and perpetuated the preliminary injunction.

Said court retained control of said case, and on *January 7, 1901* (*Rec., p. 67*) the city and its assessor appealed to this court, which dismissed the appeal as premature, *185 U. S., 270* (*Rec., p. 73*).

Afterward, *to-wit, on April 28, 1902*, this court's mandate was filed and the case redocketed (*Rec., p. 71*), and on *June 3, 1902*, the city and its assessor moved for a modification of the aforesaid injunction, restraining the assessment for any time previously to March 21, 1900 (*Rec., p. 71*); and on *July 7, 1903*, the city and its assessor filed an answer, asserting that all the stock of the bank was taxable from *1893 to 1902*, both inclusive, for State and local purposes, asserting its proposed assessment of all the shares of the bank's stock, etc. (Rec., p. 79). Said answer was subsequently stricken from the files (*Rec., p. 84*). Afterward, *to-wit, on May 19, 1903*, the court filed its opinion (*Rec., p. 88*), and entered its decree (*Rec., p. 102*), adjudging that the bank's bill of complaint be dismissed as to tax assessable and collectible *subsequently to March 21, 1900*, and reaffirming and perpetuating the previous injunction against the assessment or collection of

taxes for the time *previously to March 21, 1900* (*Rec., p. 102*). From this decree both parties appealed. (*Rec., pp. 103, 107.*)

ASSIGNMENT OF ERRORS.

The bank's assignment of errors is as follows:

First; In dismissing its bill of complaint in so far as it sought to enjoin the assessment and collection of taxes *subsequently to March 21, 1900.*

Secondly; In refusing to perpetuate the temporary injunction covering the full period of the bank's corporate existence.

Thirdly; In failing to adjudge that the bank had an irrevocable contract with the State upon the continued compliance by it with the provisions of the act of *May 17, 1886,* whereby no tax for municipal purposes could be exacted from it based upon the shares of its capital stock, or upon any of its property except its real estate and banking building during its corporate existence, *to-wit, until November 17,1904, inclusive.*

Fourthly; In failing and refusing to declare the act of the Kentucky legislature of *March 21, 1900,* in so far as it attempted to impair the validity of the bank's contract, to be null and void.

Fifthly; In failing and refusing to adjudge that the contract between the State and the bank was *res judicata,* and that the State and city were estopped to claim or assert that the bank had not such irrevocable contract.

ARGUMENT.

The very elaborate and able brief filed upon the previous appeal, by James W. Bryan, since deceased, presents an excellent argument of the questions presented by this record.

The points for argument here are:

1. That the Act of March *21, 1900*, so far as it is retroactive, infringes the *Fourteenth Amendment* to the Federal Constitution, in taking the property of the bank and its shareholders without due process, and denying it the equal protection of the laws; and so far as it authorizes the assessment and taxation either previously or subsequently to March 21, 1900, discriminates against National banks and their shareholders, and offends *section 5219* of the Revised Statutes of the United States.

2. The effect as *res judicata vel non* of the judgment of the Campbell Circuit Court aforesaid affirmed by the Kentucky Court of Appeals, adjudicating the irrevocability of the contract between the bank and the State under the "Hewitt" Law.

I.

The opinion of the circuit judge (*Rec., p.53*) is lucid and convincing. After quoting the statutes involved, he recites that in extreme cases, a legitimate, retroactive imposition of taxes upon property not hitherto subject to taxation may be possible, but that the case must be rare and one approaching extremely near infraction of the Federal Constitution forbidding private property being taken for public use, without just compensation, and as a very serious objection to such taxation, he instances the possibility of confiscation under such a doctrine, if property for fifty years may be retrospectively assessed, when previously exempt. He notes that curative legislation is admissible to reach omitted property, and property escaping tax-

ation because of formal irregularities, but that as to national bank shares prior to March, 1900, there was no legislation for their taxation. He says:

> "Any attempt to give it the appearance of being a curative statute is merely nominal and colorable, and can not be effective. The previous legislation had been void because it was opposed to section 5219, Revised Statutes, and could not be cured, though other new and different legislation might be enacted. Moreover it imposes a tax upon national bank shares alone, and the retroactive feature of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the State for the retroactive taxation of moneyed capital in the hands of State banks or of individuals. Other banks paid, and now pay, only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon State banks, but a tax the rate of which is the same as that 'upon real estate,' which rate might not comply with section 5219 of the Revised Statutes, unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the Supreme Court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax."

On the retroactive feature of taxation, the proposition is to substitute, *in March, 1900*, the liability of the shareholders of the bank during the preceding eight years for the non-liability of the bank under the *act of 1892* putting a tax on its franchise, and this is termed taxing property already taxable simply by providing a new method therefor, and not taxing property hitherto not taxed, or not taxable. In the meanwhile, *i. e.*, from *1892 to 1900*, the bank had paid taxes under its contract made in *1887* under the provisions of the *"Hewitt Law" of 1886*, ad-

judged by the highest court of the State to be irrevocable. Exactly upon what grounds the liability of the shareholders for the past years might be substituted for the bank's non-liability for those years, the departments of the State government are not agreed. The highest State court holds (*Commonwealth v. Citizens National Bank, 25 K. L. R., 2100, April 15, 1904, Citizens' National Bank v. Commonwealth, Ib. 2254, April 27, 1904*), that under the act of *March 21, 1900*, the sheriff may cause the shares to be assessed pursuant to the provisions of *Sec. 4241, Ky. Stats.* as *omitted* property, the shares having been adjudged, in *Scobee v. Bean, 109 Ky., 526*, to have been assessable to the shareholders of the bank under the Act of 1892, the *Act of March 21, 1900*, therefore not making assessable what was not theretofore assessable, but merely providing another mode for its assessment. But while the court is holding the shareholder to have been assessable ever since *1892*, the legislature in its preamble to the Act of *March 21, 1900*, is reciting that whereas this court has held void the act providing franchise taxation of national banks, in consequence whereof there had been since *1892* no adequate mode of "taxing national banks, while State banks are now and have been ever since 1892 taxable for all purposes, State and local," therefore the necessity of the act. The emergency clause recites:

> "Whereas it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

So we have the court holding the shareholders assessable upon their stock during the entire period from *1892 to 1900*, while the legislature has recited as a reason for the passage of the Act of *March 21, 1900*, that the decision of this court in *April, 1899*, has avoided the only statutory provision for adequate taxation of National banks, and

that it is important that they should be *taxed equally with State banks.*

To a comprehension of the situation an acquaintance with *Scobee v. Bean* is necessary. In that case the assessor of Clark county in *September, 1899*, this court having held void on *April 3, 1899*, the *Act of 1892* taxing the bank's franchise, assessed for taxation against the owners thereof, certain shares in a national bank, and when the sheriff was about to collect the tax so assessed, an injunction was sought by the shareholders. The injunction was granted by the Circuit Court, but denied by the appellate court. The logic of the latter's decision is that this court held void the Act of 1892 assuming to assess the national bank's franchise, and the bank thereupon became one of those corporations whose stock is "not paid on by the company or association" (whatever that may mean) and therefore, taxable to the shareholder under sections *4050 and 4058*, providing for the payment by the shareholder of taxes on "the amount of stock in joint stock companies or associations not paid on by the company or the association." The shareholders' stock is in said case also said to be included under "Miscellaneous" "(74) value of all property not mentioned above." Accordingly, it is held in *Commonwealth v. Citizens' National Bank and Citizens' National Bank v. Commonwealth, supra*, that the sheriff may, under the Act of *March 21, 1900*, assess *the bank* on the shares of its shareholders for back taxes for all years since *1892*, and *20 per cent.* penalties upon the tax for each of said years, although *between 1892 and 1900* no law existed for the assessment of the stock of National banks, except the Act of 1892 assuming to assess the franchise of said banks.

To one familiar with the situation, it is difficult to believe that had the shareholder, between 1892 and the date of this court's decision, in April, 1899, offered to pay taxes on his stock in lieu of the franchise tax assessable under

the Act of 1892 on the bank, his proposition would have been scouted. Nevertheless, upon the assumption of his continued liability during all of said period, the *Bank* is declared liable for penalties of *20 per cent.* upon the tax for each year of said time for the stockholders' failure (or the bank's failure, we do not know which) to pay some tax, either that on the shares of the shareholder, or that upon the franchise of the bank.

That the doctrine of the bank cases of *April 15, 1904*, and *April 27, 1904*, is unsound, is apparent upon the slightest consideration. It is based upon the assumption that the Act of *March 21, 1900*, only provides another mode for assessing what was already assessable, viz., the shares in the hands of the shareholders, and not for taxing what was previously not taxable.

As aforesaid, the court adjudges the liability of the shareholder upon the assumption that the national bank by this Court's decision has become one of those corporations which have not paid taxes on their property and whose shareholders are, therefore, taxable upon the value of their shares as upon their other personal property. This decision is based upon a review of Sections *4020, 4022, 4047, 4050, 4052, 4058, 4085, and 4088.*

If it were material so to do, it could be shown by a review of the statutes that the decision is unsound. The evident meaning of the statutes is not that the shareholders shall be assessed wherever the corporation fails to pay its taxes, for this would contemplate a retrospective assessment, it being impossible to know until the corporations' taxes were due whether or not they would be paid, but the meaning of the statutes is that the shareholders shall be liable when the corporations, under the provisions of the Revenue Law of which the sections relied on are a part, are not liable for taxes upon their property. This is apparent from the language of section 4088, *viz.:*

> "Sec. 4088: The individual stockholders of the corporations which are by this article required to report and pay taxes upon their corporate franchise shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises as herein provided."

The statute must be construed as prospective and not retrospective and as contemplating the validity and not the nullity of any of its provisions. The liability, therefore, of shareholders in those corporations not paying taxes upon their property which is imposed by *section 4058* was not intended to reach shareholders of national banks.

Assuming, however, *Scobee v. Bean,* a correct exposition of the statutory law of Kentucky, how can its doctrine avail for the retrospective assessment of the shares of the shareholders of National banks under the Act of March 21, 1900, when the shares of resident holders only could have been assessable from *1892 to 1900* under the doctrine of that decision and all the holders, non-resident as well as resident, of the shares of national banks are now assessed under the *Act of 1900* and the *bank* made directly liable for the taxes upon all such shares. If only resident holders were liable to tax in Kentucky upon their personal property, how can it be said that the bank's liability under the Act of March 21, 1900, for the tax upon all of its shares as well those owned by non-residents as by residents, amounts simply to a new method of taxing what was previously taxable? Certainly residents of New York or other States were not liable to taxation in Kentucky under sections *4020 and other sections,* which are the basis of the decision in *Scobee v. Bean,* nevertheless the bank is by the Act of March 21, 1900, made liable for the taxes of those non-residents upon their personal property, *to-wit,* shares of stock, and it is said that this is to tax what has always been taxable. The shareholders for any year

from *1892 to 1900* may have been non-residents, and for any other year principally residents, nevertheless this fact is made immaterial by the decision in *Commonwealth v. Citizens' Nat'l Bank and Citizens' Nat'l Bank v. Commonwealth,* and by the *Act of March 21, 1900,* requiring the bank to list the shares of all its shareholders and pay the tax on all such shares. Sec. 4020 aforesaid provides:

> "All real and personal estate within this State and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereafter provided shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale."

The Kentucky Court in *Baldwin v. Shine, 84 Ky., 502 (1886)* said *(p. 512):*

> "It is true that debts have no place independent of the domicile of the owner. While specific articles of personal property permanently located in this State, and belonging to non-residents, may be listed even to the possessor, yet evidences of indebtedness have no actual *situs* here, and must be treated as located with the non-resident owner; but that case is not this one," &c.

In *Lexington v. Fishback's Trustee, 109 Ky., 770,* the court held that the residence of the *equitable* owner was the *situs for* taxation of personal property.

In *Frankfort v. Fidelity Trust &c., Co., 111 Ky., 667,* the court held that bonds owned by non-residents, although secured by mortgage on Kentucky real estate, and the trustee in the mortgage resided in Kentucky, were not taxable

in Kentucky, but that the *situs* of such bonds was the residence of the owners respectively.

It is unquestionable, therefore, that shares of stock of the non-resident shareholders of the national banks were not taxable in Kentucky as the "other personal property" of residents of Kentucky was taxable.

The Act of March 21, 1900, contemplates no distinction between resident and non-resident shareholders, and there is nothing in it to intimate the necessity of any inquiry into the residence of each or any shareholder on the first day of Septfember of any back year, much less to require the payment on only the shares (possibly a few) of the resident shareholders. On the contrary, the emergency clause in the statute declares the urgency of "State banks and national banks being taxed equally for all purposes," and not for national banks being taxed only upon the shares of those of their shareholders who are residents of the State from 1892 to 1900, and therefore taxable upon their lists of personal property.

Not only is the meaning of the *Act of March, 1900,* unmistakable, but in *Commonwealth v. Citizens' National Bank,* the court adjudged the imposition of penalties of *20 per cent.* upon the *bank* as delinquent during the years *from 1892 to 1900,* thereby recognizing that the act made the *bank* delinquent for back taxes. The case we have, then, is that because forsooth there were, or may have been, resident shareholders in Kentucky in the period from *1892 to 1900* (the number of such shareholders being immaterial, therefore the shares of national banks were taxable during those years, and national banks are accordingly delinquent because of the failure of all their shareholders to pay taxes during those years, and the Act of March 21, 1900, simply provides a new method of taxing what was previously taxable, and the banks may now be made to pay taxes on all their shares of stock for all of such years and pay penalties of *20 per cent.* upon the taxes for each year.

If this be allowed, then, as said by the learned judge of the Circuit Court (*Rec., p. 57*):

> "There is no limit to it, and it might illustrate the subject to consider the result if church property now exempt should, as it lawfully might, be made subject to taxation in the future, and not only be, but retroactively, for ten or twenty, or even fifty years back. Here would be a practical confiscation of such property, for public use."

a. No retroactive power such as is claimed here is given under section *5219 U. S. Rev. Stat.* That section is the source of all State power to tax National banks. (*Owensboro Nat. Bank v. Owensboro, 173 U. S., 664, 668*, and nothing like the power claimed can be gleaned from the statute. It authorizes the State to tax all the shares of National banks, provided that the tax be not a greater rate than that assessed upon "other moneyed capital" in the hands of individual citizens of the State, and that the shares of non-residents be taxed in the city or town where the bank is located and not elsewhere. *Section 5219* levies no tax; it merely authorizes the State to levy a tax. The section, too, contemplates only prospective taxes, for otherwise it would authorize the State's taxing the property of *non-residents* for past years, during which their property had not been taxable. Section 5219 was not enacted until a year or more after the passage of the *National Banking Act*, and, nevertheless, upon the construction required by our opponent's contention, that section must have given the right to the State to tax for a period before the passage of section 5219, the holders of the shares of National banks. This is not a just construction of the section. Not only does the statute bear no such construction, but the rule of construction is that statutes are prospective and not retrospective, unless the contrary clearly appears.

If section 5219 permits the State to make a retrospective assessment in a case like this, then the State might tax all shareholders of national banks for back years, although it had during such years jurisdiction over the residents only, and not over the non-residents. While the State may avail itself of the authority given by section 5219 to tax the non-resident shareholder of National banks, it can do so only by virtue of the act, and there is nothing in the act to give to the State the right to tax non-residents for years when they were not liable for taxation in the State.

The observation above quoted of the learned circuit judge (*Rec., p. 57*), applies with increased force to the present situation. To tax church property or other exempt property by retrospective legislation for ten or twenty or fifty years, would amount, indeed, to confiscation, and an infraction of the fourteenth amendment forbidding property to be taken without due process, but what must be said of the State statute assuming under the authority of *section 5219* to tax for ten or twenty or fifty years the shares of National bank stock of non-residents whose shares were never previously taxable in the State. To tax in a State property whose *situs* is elsewhere amounts to taking property without due process. *Louisville, &c., Ferry Co. v. Kentucky, 188 U. S., 385, 395.* And to tax by retroactive statute property not previously taxable for the period of time covered by the proposed tax equally offends the same principle. *Bellevue v. Peacock,* 89 Ky., 495.

In *Bellevue v. Peacock,* a street was improved by assessment of the cost upon adjacent property owners under the misapprehension of power in the town charter so to do. The absence of the power being adjudicated, the legislature attempted by retroactive statute to confer the power, but the act was condemned by the court as unconstitutional. The court said *p. 499:*

> "When the contract was entered into, the town had no authority, express or implied, to bind his property for the cost of the improvement, and when the statute, by virtue of which relief is now asked, was enacted, there was no pre-existing right as against him, or to look to his property. In short, the legislature, by this act, has attempted to afford a remedy against a party as to whom no right, legal or equitable, existed."

Accordingly, the statute was condemned, although enacted "through a laudable desire that justice should be done."

We, therefore, submit that the legislature was without the power to enact *section 3* of the Act of March *21, A. D., 1900* (*Rec., p. 53*).

b. The Act of March 21, 1900, for another obvious reason, does not merely tax what was already taxable viz., that the shareholders were already actually taxed, and the bank paid the tax under the "Hewitt Law" (*Rec., p. 5*).

c. The entire Act of March 21, 1900, however, is void upon another ground, to-wit, that it taxes National banks upon a basis, not the legal equivalent of the basis upon which State banks are taxed by the Act of 1892. The "Hewitt Law" had carefully taxed the shares of both National and State banks alike, and given each the same right to surrender rights held under Federal or State law in return for the same basis of taxation. The Act of 1892 abandoned this legitimate method of taxation of National banks, and undertook to tax their franchises and property. This Court condemned the Act of 1892, notwithstanding the State's claim of "legal equivalency," and *equivalency in fact,* of the two methods and nevertheless in the face of such condemnation by this court, the Act of March 21, 1900, perpetrated the same inequality condemned by this court by taxing National banks upon their shareholders'

shares and State banks upon their franchises and property, methods just adjudged not legally equivalent. The language of this Court demonstrates the invalidity of the *Act of March 21, 1900.* It said, *p. 676:*

> "It is however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are the equivalent to a tax on the shares of stock in the names of the shareholders, and therefore, do not violate the act of Congress."

The court then noting the incongruity of such claim further said:

> "Passing nevertheless this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question.
>
> "To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court as to national banks," etc., etc.

After reviewing authorities this court said, page 680:

> "If the postulate upon which they (the authorities) necessarily rest be overthrown by saying there is an equivalency between the taxation of the property of the bank and the shares of stock in the names the shareholders it would follow that the principles upheld by the cases would disappear with the destruction of the reasons upon which they were placed," etc., etc.

Upon legal equivalency this Court thus concluded, page 682:

> "There being, then, no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise, intangible property of the corporation, was not within the purview of the authority conferred by the act of Congress, and was, therefore, illegal.
>
> "Whilst this confusion suffices to dispose of the case we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and, therefore the tax should be sustained. It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute in question is too plain to require comment. The fact that it is not is illustrated by *Henderson Bridge Co. v. Kentucky, supra,* for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total amount of the capital stock, proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact were to rise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

The principles thus expounded settled the fate of the Act of March 21, 1900, for obviously there is no equivalency in law in the methods of taxation prescribed by that act and the Act of 1892—this court has, as just shown, emphatically said so—and there may be no equivalency in fact, for after deducting the State banks' United States government bonds its taxable assets may be far less than the value of the National banks' shares, although the National banks have the same amount of assets, including the same amount of such government bonds. At any rate the question of the right of taxation must not be reduced to "only a pure question of fact" (*p. 683*).

Van Allen v. The Assessors (*3 Wall., 573 L. ed. 18 p. 229*) as expounded in *173 U. S., 677*, seems conclusive of the instant question, for this court there said (*p. 677*):

> "Two issues were presented, one the assertion that the State banks were assessed on their capital and surplus, and, therefore, that stockholders in national banks were substantially discriminated against. This was held to be well taken; clearly, therefore, deciding that there was no equivalency between taxing the capital and surplus in the hands of the bank and taxing shares in the names of the shareholders, for if the two had been equivalent the decision would necessarily have been otherwise."

In Van Allen v. The Assessors, Mr. Justice Nelson said (*p. 581*):

> "The banks of the State are taxed upon their capital; and although the Act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which are exempt from state taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

It is thus demonstrated that the State has in repealing the "Hewitt Law" abandoned a system of taxation which it has as yet failed to replace with a valid law for taxing National bank shares.

d. It is now settled in Kentucky that retrospective taxation under Kentucky Statutes, *section 4021* is limited to the time when assessment could first have been made, *Chicago, St. L. & N. O. R. R. Co. v. Com. 24 Ky. Law Rep., 2124, 72 Southwestern 1119, and Com. v. Nute, Ibid. 2138, 72 Southwestern, 1090.* But irrespective of this, and of all that is said above on retroactive assessment, and even if there was no question of *res judicata*, and the Act of March 21, 1900, confessedly valid, yet the appellee and its shares of stock could not be assessed for taxation by the city of Covington for any time prior to the passage of that act. The settled law of Kentucky is, as declared by the Court of Appeals of that State in *Franklin County Court v. Louisville & Nashville R. R. Co.*, 84 Ky., 59 (syllabi):

> "Where there has been a failure to list property for taxation because of the decision of the court of last resort in the State that such property was not subject to taxation, the fact that the court subsequently decides that the law was misinterpreted will not authorize the collection of taxes on the property for the period during which the law as announced and understood did not require such property to be listed for taxation.
>
> "The Court of Appeals of Kentucky decided in 1868 that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety, and liable in its consolidated character for State revenue only. This case was followed by another to the same effect, and the law remained as declared by the Court of Appeals until 1876. So much of appellee's road as is in Franklin county was not assessed for county

taxes for the years 1868 to 1875, inclusive, and the county now seeks to collect taxes thereon for those years. *Held*, that while the court is of opinion that the law was misinterpreted, yet, as appellee complied fully with the existing law, as interpreted by the highest tribunal in the State, no more should be required of it."

The court in that case, at pages 64, 65, said:

"From 1868 to 1875, inclusive, it was, however, the law, as declared by this court, that the road of the appellee was not taxable for county purposes. There was no express statutory provision to the contrary. Rights were acquired and duties performed in accordance with the then law as announced and understood, and in the absence of an express statute to the contrary, the then construction of the law must yet be held to be *the* law governing the acquisition of rights, or the performance of duties of that period.

"It is well settled that if a contract be valid under the law as previously expounded by the courts, and as understood at the time, no subsequent judicial action will render it invalid. Parties have the right to and do contract with a view to the then law as declared. (*Olcott v. The Supervisors, 16 Wall., 678.*)

"It is equally just that the same rule should apply as to duties required of them, such as the listing of their property for or the payment of taxation. Otherwise, they would not know when or how to act safely as to investment; and it would introduce much uncertainty and mischief into the business of the country. If they comply fully with the existing law, whether it be in *the form of positive legislative enactment or judicial interpretation, no more should be required of them.*"

This case was quoted with approval of the court in *Commonwealth for, etc., v. L. & N. R. R.*, 89 Ky., 139.

Applying the law, as thus declared by the court of last resort in Kentucky, to the facts in the case at bar, there can be no assessment of the shares of appellee's capital stock until after the passage of the Act of *March 21, 1900.*

The Court of Appeals of Kentucky, in June, 1895, decided appellee not liable for taxation by appellant, and with that knowledge, no act was passed by the legislature until March, 1900. It is true that in 1897 the Court of Appeals held contracts similar to appellee's not to exempt those particular banks, but it could well be said that, as these cases involved questions under the Constitution of the United States, there was no final decision therein until May, 1899, and not *until then* was the decision of June, 1895, by the Court of Appeals of Kentucky, finally overruled, and not until then, when this court had spoken, was it finally determined whether, under the Constitution of the United States, the contracts made under the Hewitt Law in 1886 could be revoked by the State. As so clearly stated by the Court of Appeals in that case, 84 Ky., page 65:

> "Rights were acquired, duties performed in accordance with the *then law as announced and understood,* and in the *absence of an express statute to the contrary,* the *then* construction of the law must yet be held to be *the* law governing the acquisition of rights or the performance of duties of that period."

The record in this case shows the full compliance by appellee with all the requirements of it, as *expressly* held by the Court of Appeals of Kentucky, and it shows the reduction of stock, payment of dividends, sale of shares, etc., during the time when it surely had the right to say that it was in every respect acting entirely within, and in accordance with, the law as declared to be.

II.

The next question is if the judgment of the Campbell Circuit Court, affirmed by the Kentucky Court of Appeals, adjudging in the bank's favor an irrevocable contract under the "Hewitt Law" exempting the bank from all taxation, except by that law imposed, is *res judicata* of that question, and prevents its relitigation here.

In the *Owensboro National Bank Case, 173 U. S., 648*, this court expressly withheld an expression of opinion upon the question, and in *Bank of Kentucky v. Stone, 88 Fed. Rep., 383*, Justice Harlan and Judges Taft and Lurton determined the question favorably to our contention, and their judgment was affirmed by this court by an equal division of the judges; *174 U. S., 799*. The learned circuit judge, in his opinion, declared his very strong impression that the question was concluded in our favor by this Court's decision in *New Orleans v. Citizens' Bank, 167 U. S., 371*, but felt "oppressed" by the thought that such a ruling might make inequality and injustice inasmuch as the irrevocability of the contract adjudged in our favor aforesaid has been subsequently denied by the highest court of Kentucky, and by this court, and he reserved the question. That a consideration of the consequences of *res judicata* if it be established, is inadmissible is well illustrated by *Stone v. Deposit Bank of Frankfort, 174 U. S., 1187*. Courts have no concern with the consequences when the law is plain. Here the law is plain. Indeed, our contention is irrefutable under the doctrine of *New Orleans v. Citizens' Dep. Bank (167 U. S., 371)*.

The learned circuit judge granted a preliminary injunction against back taxes, and retained the question as to taxes assessable under the *Act of March 21, 1900*, based upon the question of *res judicata* aforesaid, and that question was afterwards so elaborately and ably reviewed by

his successor. His opinion advances an argument in our favor perfectly unanswerable, but, for a reason totally inadequate, he stops short of the inevitable conclusion of his logic, and renders a judgment the reverse of it.

The learned judge declares (*Rec., p. 90*) that it is certain that in the suit in the Campbell Circuit Court, afterward affirmed by the Court of Appeals, the contract upon which we rely had been adjudged irrevocable; that both courts had delivered written opinions, and while the Circuit Court had placed its decisions on two grounds, "the latter (irrevocability of the contract) was the main ground of its action, and such was the only ground upon which the Court of Appeals based the affirmation of its judgment."

He next states our opponent's contention that this was a suit to enjoin the collection of taxes for years subsequently to the years taxes for which taxes were in litigation in the case adjudged, and his opinion against the contention. He then quotes this court's language in *Sou. Pac. Co. v. U. S., 168 U. S., 45*, that a right question, or fact distinctly put in issue and determined as the ground of recovery can not be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action but that the right question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the first judgment remains unmodified. That

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between

> the parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined."

The learned judge then declares that the principle so expounded had been applied in *New Orleans v. Citizens' Bank, 167 U. S., 371*, and *Baldwin v Maryland, 179 U. S., 220*, and quotes at great length the opinion of this court in the former case, couched in language at once unanswerable and decisive of our contention (*p. 91*). Extracts can not be made without marring the whole.

The judge then quotes from the latter case as follows:

> "There is no pretense that the taxes of 1895 stand in any other condition as to the matter of fact than the taxes of 1893 and 1894, which were in terms included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895 comes within the force of that decision, and is determined by the conclusion in respect to taxes of 1893 and 1894. Johnson Street R. Co. v. Wharton, 152 U. S., 252; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S., 683; New Orleans v. Citizens' Bank, 167 U. S., 371."

The judge then recites that the doctrine of those cases had been applied by the Federal Court in Kentucky and by this court in cases exactly like our case (save in a particular thereinafter noted citing numerous decisions). (*Rec., pp. 90, 91, 92.*) That he is sustained to the letter appears from the language employed in *Bank v. Stone, 88 Fed. R., 393, viz.:*

> "The second question in the case is that raised by the averment of former adjudication. The case of the *City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S., 371, 17 Sup. Ct. 905*, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' Bank in New Or-

leans was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted, and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the District Court of New Orleans to enjoin the collection of a tax against it, on the ground that it had, by legislative contract, exemption from the same. The District Court sustained the claim, and enjoined the collection of the tax. A second suit brought to enjoin another year's taxes resulted in a similar judgment. Some years later the city of New Orleans having attempted to collect a tax for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the Circuit Court of the United States for the Eastern District of Louisiana, to enjoin the officers of the State and the city from proceeding to collect the tax, and set forth the former adjudicaton as a conclusive estoppel upon the defendants as to the point of previous litigation, namely, that there was a contract between the State and the bank forbidding such taxation. The causes of action were not the same in the case brought in the Federal Court and the cases adjudged in the State courts, because they involved taxes for different years; but the thing adjudged, to-wit, the existence and binding effect of the contract for the exemption for the particular taxation was the same. The Supreme Court of the United States in this case held that the City of New Orleans and the State taxing authorities were conclusively estopped by the judgments in the State courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation, and held that the contract having been thus established the bank was entitled to relief from a violation of that contract by any acts of the State officials acting under the authority of State legislation. It had theretofore been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a State or any agency of the State for the collection of taxes in a

suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White in delivering the judgment of the court, in a most elaborate opinion, said:

"'The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* can not apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-books, and enforced by many decisions of this court. * * * It follows then that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.'"

After determining that the irrevocability of our contract was adjudicated by the Kentucky Court, notwithstanding the fact that the Circuit Court alleged two grounds for its conclusion (the Appellate Court having alleged only one), the learned judge below, stated the question treated by him as crucial, viz.: *If the Kentucky Court of Appeals would give to its judgment adjudicating the irrevocability of the contract the same effect which would be given to it by this court,* concluding upon authority of *Union, etc., Bank v. Memphis, 189 U. S., 71 (L. Ed. 47, p. 712)*, that unless it would do so, he must follow the rule of the State court, and disregard the rule of this court.

The learned judge next reviewed the Kentucky cases relied on by him, and collated, (*Rec., p. 96*) and concluded that the doctrine of the Kentucky Court of Appeals was that a judgment for taxes for one year was never *res judicata* of the liability for taxes for a different year; but we submit that his review of the Kentucky cases establishes clearly the reverse.

The learned judge, in his review of the Kentucky cases shows that the question now mooted was examined only in *Newport v. Commonwealth, 50 South. W. Rep., 845; 51 Ibid., 433,* and that the subsequent cases had simply referred to the discussion of that case as an exposition of the question, whenever raised. He then shows, we submit, conclusively, that the question was not adjudicated against us in that case, but distinctly and intentionally reserved. We can not state the Kentucky Court's position better than the circuit judge stated it below (*Rec., p. 97*).

He said that *Newport v. Commonwealth* was a suit by the State against the city to recover taxes under the Revenue Law of 1892, for the year 1894 on the franchise of the city to operate a water works; that among the city's defenses was a plea of *res judicata;* that it was pleaded that a suit had been brought against the city for taxes under the law of 1892, for the year 1893 on said franchise, and that said suit had been dismissed by the Circuit Court, and its judgment never reversed. That the city claimed the decision to be *res judicata,* but its claim was denied by the Appellate Court, and

> "It would seem that the judgment of the majority of the court was placed upon the broad ground that in no case and to no extent could a judgment in a suit as to one year's taxes be *res judicata* as to another year's taxes. Judge DuRelle in stating the opinion of the majority of the court based the holding on this reasoning, to-wit:

"'The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of these promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist regardless of former adjudications as to the validity of a different tax.'

And again:

"In our opinion it would be against public policy to hold that a judgment of a Circuit Court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years merely because counsel for the Commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the Commonwealth bound by the laches of its officers."

The learned circuit judge declares that *in response to a petition for a rehearing,* it appears that a minority of the judges desired an extension of the opinion,

"So as to include the qualification upon the general rule laid down as to the application of the doctrine of *res judicata* in tax cases, to-wit: 'But whether the State is bound by a former adjudication that there exists a contract exempting from taxation, or as to the construction of such a contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the Commonwealth exercising the highest of its sovereign powers—a power neces-

> sary to its very existence—and the same Commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But, it is not necessary in our judgment, to go into this question, nor even to decide that there is a difference.'"

So far, therefore, from the court in *Newport v. Commonwealth* holding that *res judicata* is not affirmable of any question in a tax case the court distinctly declares that if there be in a tax case a question of contract exemption and such question be adjudicated, whether or not the adjudication is conclusive in cases concerning taxes for subsequent years is a question which might be entirely different from the question before the court.

When, then, the court subsequently said, as quoted by the learned circuit judge (*Rec., p. 98*):

> "The plea of *res judicata* relied on has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for it to consider this question; it having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit, between the same parties, under the same law, for another year's taxes."

The court could not have meant that it had been "so frequently" decided adversely to the contention that *res judicata* could be affirmed of an adjudication of the existence of a contract for tax exemption, for the court in the *Newport* case had expressly declared not only that it was making no such decision, but that it was unnecessary to make such decision. But when the court said:

> "The plea of *res judicata* relied on has been decided so frequently adversely to the contention here made," etc.

And

> "Decided that a judgment by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit, between the same parties, under the same law, for another year's taxes."

The court must be assumed to have meant that it was decided in *Commonwealth v. Newport*, and subsequent cases simply that a judgment for taxes for one year was not *res judicata* of the State's right or the taxpayers' liability for similar taxes for subsequent years, and could not have meant that an adjudication of the existence or nonexistence, or of the validity or invalidity *of a contract exemption* from taxation in the first case could not be *res judicata* of such a question in the second case. In other words, the Court of Appeals must not be assumed to have misrepresented its previous decision, but must be taken to have recited it correctly.

In each subsequent case where the Kentucky Court's decision was against the plea of *res judicata* the decision amounted simply to an adjudication that a judgment for one year's taxes was not conclusive of liability of the taxpayer for a subsequent year's taxes, and in none of such cases did the Kentucky Court hold that an adjudication in one case of a *contract exemption* from taxation was not *res judicata* in a subsequent case.

When, therefore, we find the court declaring in *Newport v. Commonwealth* that there seems to be an an essential distinction between denying *res judicata* of tax liability in contests over taxes for subsequent years, and the adjudication of contract exemption from taxation, and find the learned circuit judge recognizing that such was the effect of the decision in *Newport v. Commonwealth*, his error in misconstruing the language of the Kentucky Court in the subsequent cases becomes obvious.

In the late case of *Frankfort v. Deposit Bank, 111 Ky., 950* (65 S. W., Rep., 110), reversed by this court, *191 U. S., 499*, the bank's counsel contended that the Federal Court's decision amounted to an adjudication of an irrevocable contract under the "Hewitt Law," and responding thereto the Kentucky Court said (p. *952*):

> "It is insisted by counsel for appellee that the Federal Court not only held that the judgment of the Franklin Circuit Court in this case was a bar to a recovery for taxes for the years 1895, 1896, 1897 and 1898, but also a bar to the right of the city to assert a claim for taxes for other years, as the judgment of the Circuit Court sustained the claim of the appellee that it had an irrevocable contract under the Hewitt Law. This position might be taken with some plausibility under recent rulings of the Supreme Court of the United States, if the judgment in question had remained unreversed. It has not only been reversed, but this Court, and the Supreme Court of the United States held that the bank did not have an irrevocable contract under the Hewitt Law."

The learned judge's review of the subsequent cases demonstrates that the question now presented was not in any of them involved, nevertheless apparently contrary to his own opinion, and expressly contrary to the ruling of this court, he concludes the rule of decision in the Kentucky courts to be against us, and dismisses our bill as to all taxes assessable subsequently to March 21, 1900; which we submit was an egregious error.

The learned judge seems to have been overwhelmed by this court's decision in *Union, &c., Bank v. Memphis, 189 U. S., 71* (*L. Ed. 47 p. 712*), but that case when the Tennessee rule of decision is understood, in no wise affects the instant case. The Tennessee rule is radically different from the Kentucky rule. The doctrine of the Tennessee Court is exactly what this court said in Newport v. Com-

monwealth, was not involved, and not decided. The Tennessee Court in the case which upon writ of error was decided by this court in *189 U. S., 71*, thus declares its doctrine.

> "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in City of New Orleans v. Citizens Bank, 167 U. S., 371, 17 Sup. Ct., 905,, in which it was held by a majority opinion, that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved." *46 Southw. Rep., 557, 560.*

Accordingly, in *Union & Planters' Bank v. Memphis*, this court declined to follow *New Orleans v. Citizens' Bank (167 U. S., 371)*, but deferred to the Tennessee rule exactly the reverse of this court's ruling. Kentucky has not followed the example of Tennessee in repudiating the doctrine of New Orleans v. Citizens' Bank, as to adjudication of contract exemptions, but in response to a petition for a rehearing in *Newport v. Commonwealth* expressly declared that the existence of the doctrine was not in issue, and has never departed from this position.

Accordingly, we may accept the doctrine quoted by the circuit judge in language of the Kentucky Court, to-wit:

> "That a judgment as to the validity of taxes in one year is not conclusive as to the validity of taxes on the same property for another year."

And nothing is asserted against our contention. Indeed such was adjudged in *Newport v. Commonwealth*, and nevertheless the court expressly refrained from deciding the question now under consideration.

Again, this court in *New Orleans v. Citizens' Bank* (*167 U. S., 371*), announced the doctrine compassed in the language just quoted from the Kentucky Court, *to-wit:*

> "That a judgment for taxes for one year is not *res judicata* as to taxes for a subsequent year."

So, in the *Newport case* the question now under discussion was expressly reserved, and in *New Orleans v. Citizens' Bank* this court emphatically, and after elaborate discussion decided it in our favor in language which can neither be added to nor subtracted from, but which is at once convincing.

We submit, therefore, that the sole basis upon which the circuit judge contrary to the ruling of this court, and apparently contrary to his own view as aforesaid, decided against us, viz.: That the Kentucky rule was against us, arose from an entire misapprehension of the Kentucky decisions, and that the question should have been decided in our favor upon the authority of *New Orleans v. Citizens' Bank.*

In what we have just said we have assumed *this Court* to have decided in *Union & Planters' Bank v. Memphis,* that it will follow the State Court's decision as to the effect of a State adjudication although opposed to this Court's view of such effect. We submit, however, that there is ground for holding exactly the reverse. This Court has often held that even upon a writ of error to the State Court upon a claim that a statute has impaired the obligation of a contract, it will itself determine whether or not the contract existed as claimed, and will not accept the State Court's decision of that question. If this court would treat as conclusive the State Court's decision as to the existence of the contract, it might as well treat as conclusive the State court's decision as to the impairment of the contract for the State Court could in every case fortify its decision be-

yond attack simply by holding the non-existence of the contract instead of holding that the contract existed but had not been impaired. The same rule ought to hold where the contract which it is claimed has been impaired exists by force of an adjudication—or in other words is a contract of record—as in the case of any other contract. In the instant case, the contract which we claim was impaired by the Act of March 21, 1900, is the contract of record manifested by the record of the Campbell Circuit Court and Kentucky Court of Appeals. When we assert this contract's impairment, and the existence of such contract is denied by the city of Covington, the question of its existence would seem to be as much for this court's decision as a question of the existence of any other contract which is claimed to have been impaired by an act of a State legislature.

The doctrine of *New Orleans v. Citizens' Bank*, upon which we rely, is re-enforced by the decision of this Court in *Deposit Bank v. Frankfort, 191 U. S., 499*, where this Court gave the bank the benefit of the adjudication in its favor of the question of its exemption after the opinion had been expressed as well by this court as the Kentucky court, that the original claim of exemption was unsound.

Upon another principle the Circuit Court erred in applying what it supposed to be the Kentucky rule, viz., that all the Kentucky decisions invoked were made after the judgment of the Campbell Circuit Court aforesaid. In *Douglass v. Pike County, 101* U. S., *677*, this court held that it would not reconsider upon a State court's change of judicial decision, its previous ruling based upon the State court's previous ruling, saying (*p. 686*):

> "We are, then, to consider whether under these circumstances, we must follow the later decision to the extent of destroying rights which have become vested under those given before. As a rule we give the construction which the highest court of a State

has given a statute of a State as part of the State, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. The language of Mr. Chief Justice Taney in Rowan v. Runnels, 5 How., 134, expresses the true rule in this subject. He said, page 139: 'Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court were lawfully made.' Afterward, in the Ohio Life Insurance & Trust Co. v. DeBolt, 16 How., 416, the same learned chief justice, after reiterating what he had before said in Rowan v. Runnels uses this language: 'It is true the language of the court in that case is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.'"

We respectfully submit that the decree of the Circuit Court should be affirmed upon the appeal of the city, and reversed upon our appeal, which is accordingly prayed.

SHELLEY D. ROUSE,
EDMUND F. TRABUE,
For First National Bank.

JAMES S. PIRTLE,
JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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vs.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KENTUCKY, APPELLEES.

REPLY BRIEF.

Our original brief so fully anticipates most of the argument of our opponents as to make necessary reply to very few points.

The statement (*Brief, p.* 1) that out of about one hundred national banks ninety-five are paying taxes and the state-

ment (*p.* 15) that State banks in Kentucky do not own United States bonds because an unprofitable investment have no foundation in the record, and no relevancy if true.

The statement (*p.* 2) reciting the action of Judge Evans and the statement (*p.* 24) reciting the action of Judge Cochran are misapprehensions of the decisions of those judges. (*See Rec., pp.* 61, 89.)

We shall notice very briefly the points made by our opponents:

First (*Brief p.* 26). "The judgment relied on as *res adjudicata* and pleaded as an estoppel herein is not conclusive of the facts and the law raised in the case at bar;" and

Secondly (*Brief, p.* 18). "That it is a well-settled principle that the decisions of the State courts in the construction of a State constitution and laws are to be adopted by the Federal courts."

Thirdly. "Discrimination in the act of *March* 21, 1900."

I.

In our original brief we showed, and it was also shown by Judge Cochran, circuit judge, that the Campbell circuit court, in the decision upon which we rely as *res adjudicta*, and the Kentucky court of appeals expressly adjudged the existence of a contract made in May, 1887, between appellant bank and the Commonwealth of Kentucky for payment by the bank as taxes upon its shares of capital stock of seventy-five cents per share of $100 in lieu of all other taxes, as well upon the bank as upon its shares, State, county, or municipal. Our opponents' point now made is that the decision of the Campbell circuit court and the appellate court was simply that the bank was entitled to an injunction against the city taxes for the year 1893 under the act of 1892, and

that the present claim of the city is for taxes for subsequent years under the act of March 21, 1900, a claim made in a subsequent proceeding "where the questions, issues, facts, and circumstances are not the same in the subsequent proceedings as in the former" (*p.* 29). This point is simply a restatement in a different shape of the question discussed in our original brief, and of the question discussed by our opponents under their third heading (*pp.* 16 *to* 27).

It is true that in the suit in the Campbell circuit court only an injunction against the taxes for the year 1893 assessable under the act of 1892 was sought; also true that the only relief therein granted was such injunction against such taxes. It is likewise true that under the decisions of this court and of the Kentucky court of appeals an adjudication on liability for taxes for one year is not an adjudication of the liability for taxes for subsequent years upon the same property, but the point now made loses sight of the fact that the ground upon which the adjudication was made in the case in the Compbell circuit court was that the bank had *a contract with the State to pay taxes of seventy-five cents per share upon all its shares of stock and an immunity from all other tax issues*, as well upon the bank as upon its shares, and that it was upon the ground of such immunity that its injunction was granted against taxation under the act of 1892, which was such taxation as came within its exemption or immunity under its contract. The fact, therefore, that the "questions, issues, facts, and circumstances" were different in the two cases is immaterial. The adjudication which is conclusive in the first case is the adjudication of the existence of the contract and its effect, and this adjudication covers the same question when it arises in the subsequent case, regardless of whether the "issues, facts, and circumstances" in the two cases are the same or different. This is the decision of this court in *New Orleans vs. Citizens' Bank*, and *Deposit Bank v. Frankfort*, 191 *U. S.*, 499.

In *New Orleans v. Citizens' Bank* this court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court."

Again:

"Accepting this argument (that courts have jurisdiction of taxes but their judgments no conclusiveness) in its full consequence every judgment rendered by this court from the foundation of the Government, declaring a particular tax, or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted where the right to the tax was a part of the obligation is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation such an estoppel cannot also result from a judgment enforcing taxation."

How these principles can be doubted, or these conclusions escaped passes comprehension.

In *Deposit Bank v. Frankfort* this court, reaffirming the doctrines just invoked, said (*p.* 512):

"Again, it is urged that the taxes herein involved are those for different years than were under consideration and covered by the decree of the Federal court relied upon. The *vice* of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court.

"The controversy was as to the force and effect of the Hewitt law as a contract; not for one year, but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and

all taxes, the assessment of which did violence to the contract rights of the bank.

"The court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by State legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank."

The Hewitt Law (*Rec., p.* 3) provided:

"That shares of stock in State and national banks, &c., &c., shall be taxed seventy-five cents on each share thereof equal to $100.00, or on each $100.00 of stock therein owned by individuals, corporations, &c., and said banks, &c., shall in addition pay upon each $100.00 of so much of their surplus, &c., &c., the same rate of taxation as is assessed upon real estate which shall be in full of all tax, State, county and municipal." (*See Orig. Brief, p.* 2; *Rec., p.* 3.)

It is thus apparent that the Hewitt law provided for taxes upon "shares of stock in State and national banks," and provided that such taxation "shall be in full of all tax, State, county and municipal."

The Hewitt law also provided:

"And upon such agreement or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of the bank." (*See Orig. Brief, p.* 3; *Rec., pp.* 3, 4.)

It is, accordingly, perfectly clear that our contract has been established by the highest Kentucky court, and that by it we are exempt from all taxation on *the "bank and its shares of stock during the corporate existence of the bank" (until November*, 1904).

Moreover, this is recognized by the State, and, notwithstanding the act of March 21, 1900, while the city is assum-

ing to assess us, the State is treating us like the other banks included in the *first* bank tax cases, and is receiving our taxes under our contract made pursuant to the "*Hewitt law*" (*Rec., p.* 5). The State and its municipalities are for this reason also estopped to deny our contract.

It appeared in the case in the Campbell circuit court that the bank had paid the tax upon the shares and claimed an exemption from all other taxation, and it was upon this ground as well as another ground that that court granted the bank's injunction, but was upon this ground alone that the court of appeals affirmed the judgment of the Campbell circuit court. The adjudication, therefore, was that taxation at the rate of seventy-five cents *per* share of stock of $100 per share was assessable against the bank, and that such taxation was in full of all taxation of bank or shares. It matters not, therefore, what particular form the litigation may have assumed either in the Campbell circuit court or in the court below, the adjudication relied on by the bank was the adjudication that it had a contract to pay seventy-five cents per share upon the shares of its capital stock in full of all taxation aforesaid.

The *act of March* 21, 1900, seeks to assess the bank exactly as did the *Hewitt law*, but at a different rate (*Rec., pp.* 9, 10). The proposition now is to tax the bank, under the act of *March* 21, 1900, as much as $2.09½ upon each $100 in one year (*Rec., p.* 80).

Section 1 declares "that the shares of stock in each national bank" shall be subject to taxation, &c.

Section 2 provides that the president or cashier shall list the shares with the assessor, "and the banks shall be and remain liable to the State, county, city, town, and district for the taxes upon said shares of stock." The proposition, therefore, now is to tax the bank upon the same shares upon which it has been taxed and upon which it has paid under the *Hewitt law*, but tax it at a higher rate.

The act in full is as follows:

"An act relating to the taxation of the shares of stock of national banks.

"Whereas, the Supreme Court of the United States has lately decided that article three (3) chapter one hundred and three (103) of the acts of eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SECTION 1. That the shares of stock in each national bank in this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: *Provided*, That where any national bank has heretofore, for any year or years paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: *And provided further*, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said

bank shall be entitled to credit by said excess upon its State taxes required by this act.

"SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

"SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

"SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

Approved March 21, 1900.

The question, therefore, which was actually decided by the Campbell circuit court and the Kentucky court of appeals was that the bank had the contract it claimed, to pay 75 *cents per share* of $100 each on its shares of stock in full of all taxation on bank or shares, and it is this adjudication of such exemption which it now invokes to defeat the taxation attempted in the *act of* 1900, and the way in which the question may have arisen in the former case, or now arises in this case, is immaterial.

II.

Our opponent's point (III, *pp.* 16 and 18) is based upon a misapprehension of the principle "that the decisions of the State courts, in the construction of a State constitution and laws, are to be adopted by the Federal courts." When prop-

erly applied no principle is better established, but here a misapplication is made.

Unquestionably, in the construction of the faith and credit clause of the Constitution, the same force must be given in other courts to the judgment of a court of any State which is given in the State where rendered. This doctrine, however, has no application to the case of impairment of the obligation of contract, for that presents, not a State, but a Federal question, and upon every Federal question the Federal courts, and this court on writ of error to the State court, will place their own construction and will never follow the State court except where its opinion coincides with the Federal courts'.

Our opponent remarks that it is now established that the "Hewitt law" made no irrevocable contract, and that our contention is based solely upon adjudication by a State court of the existence of such irrevocable contract.

This court has several times considered the effect of a State judgment as a contract impairment whereof was forbidden by the Federal Constitution, but in none of the cases was the judgment based upon a contract. If a judgment based upon a contract be not a contract protected by the contract clause of the Federal Constitution, then one having a contract loses the protection of the Federal Constitution by merging his contract into a judgment—the only way by which his contract can be enforced. We should, therefore, have a *reductio ad absurdum*, for it cannot be assumed that a contract is protected from impairment by the Constitution provided only that its holder will not undertake to enforce it in the only way wherein it can be enforced, *viz.*, by judgment. We conclude, therefore, that if a judgment be based upon a contract it must be within the protection of the contract clause of the Constitution as well as the original contract was, and this observation distinguishes the cases of *Garrison vs. New York*, 21 Wall., 196; *Louisiana vs. Mayor*,

109 U. S., 285, and *Morley vs. Lake Shore R. Co.*, 146 U. S., 166.

In *Garrison vs. New York* this court held that the legislature might provide for an appeal from a previous report of damages in favor of Garrison as compensation for land taken for public use. In holding that Garrison's award was not a contract exempt from impairment this court indicated that there was no element of mutual assent in the case, and indicated the absence of the other constituents of a contract. That inasmuch, therefore, as Garrison had no contract, but only a judgment, his judgment constituted no contract.

In *Louisiana vs. Mayor* this court said that a judgment in *tort* constituted no contract, and therefore the laws providing for taxation to raise money to satisfy such judgments might be changed by legislation without impairing any contract. The considerations involved in this decision were similar to those involved in *Garrison vs. New York*.

In *Morley vs. Lake Shore R. Co.* this court held that a judgment for interest was not a contract; that interest was itself no element of a contract, but constituted damages prescribed by statute for the forbearance of money.

In all these cases, therefore, this court, in holding that the judgments were not contracts within the intendment of the contract clause of the Constitution, emphasizes the fact that the causes of action upon which the judgments were based were not contracts. We are now confronted with a case of judgment based upon a contract, and we claim protection for that judgment. This court has universally held that it will itself determine whether or not a contract exists, as well as if it has been impaired. As said in our original brief, if the court may not give an independent judgment upon the existence or absence of contract, the State court may, in every instance, defeat the contract by denying its existence instead of denying its impairment. The principle is applicable here, for after the contract may have been merged in judgment if this court cannot give an independent judgment

upon the existence of the contract, then the contract is within the power of the State court to abrogate, for the original contract upon which this court would give an independent judgment has been merged and there remains but the judgment of the State court, and upon that it is now claimed that this court must give only such judgment as it may understand that the State court would give. We submit, therefore, that where a judgment is based upon a contract this court should give to the judgment the same independent consideration which it would give the contract upon which the judgment were based if there were a claim of the impairment of that contract.

A decision sustaining our contention to the letter, although not proceeding upon the exact lines above indicated, is *Bank vs. Stone, aforesaid* (88 *Fed. Rep.*). In that case Mr. Justice Harlan and Judges Taft and Lurton held that the *first* bank tax cases constituted *res adjudicata* of the existence of the contract under the "Hewitt law," like the contract upon which we rely. We have quoted at length from the opinion in that case in our original brief, *pages* 28, 29. In addition to what we quoted we would invoke the argument of that opinion on *page* 395, where, after noting the difference between the scope of the exemption in *New Orleans vs. Citizens' Bank* and that provided by the "Hewitt law," the court said:

"In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that 'such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of the bank.' If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable, and prevented the imposition of a tax even in the form of a license tax upon its business," &c., &c.

Further said, *page* 396, that the taxing authorities were estopped by former adjudication, and that

"It is suggested that such a conclusion ousts this court of jurisdiction, because it makes the case turn on a question which does not arise under the laws or Constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort, and the county of Franklin, by the enforcement of a subsequent law of the State, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties; but it does not free the court from the obligation to enfore the Constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of City of New Orleans *v.* Citizens' Bank of Louisiana, 167 U. S., 371, 17 Sup. Ct., 527, which presented precisely this aspect, was begun in the circuit court of the United States, and was carried to the Supreme Court of the Unitd States, and the jurisdiction by the circuit court was not even questioned."

Further said:

"Such decision, embodied in a judgment unreversed, is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State decisions, and its obligations to respect the bar of *res judicata* as between the parties, is quite clearly made in Douglass *v.* Kentucky, 168 U. S., 488, although not expressly commented on."

Bank vs. Stone (88 *Fed. R.*, 383) was affirmed by this court, as said in original Brief, *p.* 26, in 174 *U. S.*, 799. Moreover,

as shown in original Brief (*pp.* 31 *et seq.*), there is no such Kentucky rule, as supposed, forbidding conclusiveness to an adjudication of a contract exemption in a tax case.

III.

In our original Brief (*p.* 19 *et seq.*) we contended that the act of March 21, 1900, was not authorized by *section 5219* of the Revised Statutes of the United States. To this our opponents make various responses—*e. g.* (*Brief, p.* 13), that our contention "is directly the reverse" of the position of the Owensboro Bank, sustained by this court in 173 *U. S.*, 662, 664; that Kentucky State banks own no Government bonds, they being an unprofitable investment (*Brief, p.* 15); that in assessing the shares of appellee bank its real estate will be deducted.

A moment's attention to these claims will suffice to destroy them:

a.

True, this court sustained the claim of the Owensboro Bank that under the act of 1892 an assessment of its franchise and property was not the equivalent of an assessment of its shares, instancing the *Henderson Bridge* case (*our original Brief, p.* 21). But it does not follow necessarily that because assessment of franchises might be disadvantageous to national banks therefore an assessment of shares must be more favorable. The point enforced by this court was that the two methods were not *legal equivalent*, and might not be *equivalent* in fact; that "mere coincidence of the sum" of the taxes did not make equivalency in fact.

b.

To the point that State banks in Kentucky own no Government bonds, "because they are unprofitable as an investment" (*Brief, p.* 15), it suffices to respond that the condition

by the terms of the postulate will last only until such bonds become profitable as an investment. Also, to answer that the record shows nothing on the subject.

Seriously, however, the point on its merits is resolved against our opponents by *Van Allen vs. The Assessors*, cited and reaffirmed in *Owensboro vs. Nat. Bank*, reviewed in our original Brief, *p.* 22 *et seq.* If the State banks own bonds exempt from taxation they are deductible from the value of the franchise, but not deductible from the value of the shareholders' shares in national banks (*Van Allen vs. The Assessors, &c., &c.*).

c.

The foregoing observations apply to the suggestion of deducting the value of the bank's building and ground from the assessed value of the shares. The value of the tangible property of the State corporation is deductible from the value of the capital stock (*Ky. Stats., sec.* 4077 *et al.* (*Rec., p.* 55); *Henderson Bridge Co. vs. Kentucky*); but the act of March 21, 1900, makes no provision for any such deduction from the value of the shares.

Seeing this difficulty, our opponents, as aforesaid, observed (*Brief, p.* 5):

"It will be noted the value of real estate of this bank is deducted from the assessed value of the shares." (*Record, page* 80)."

There is nothing on said *page* 80 to so indicate but an answer which was stricken from the files (*Rec., p.* 84); but if the answer were in the record it could only show what assessment the assessor proposed for the years named. As soon as the assessor saw fit he might conform his usages to the act of March 21, 1900.

Section 5219 (*Rec., p.* 56) permits assessment of real estate as well as shares, and *Scobee vs. Bean* (*our original Brief, p.* 12) authorizes assessment of shares in Kentucky without de-

duction. It also assumes separate assessment of the real estate. The shares of the national bank and its real estate are therefore both assessed and the real estate deducted from the franchise value of the State bank. No wonder, therefore, that our opponents were driven (*Brief, p.* 5) to invoke their stricken answer to prove intent to make an assessment which did not discriminate as does that authorized by the act of March 21, 1900.

Conclusion.

Without further extension of this reply brief we respectfully pray an affirmance of the first, and reversal of the last decree below.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 113.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KENTUCKY, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLEE.

No. 114.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLANT,

vs.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON KENTUCKY, APPELLEES.

SUPPLEMENTAL BRIEF.

Pursuant to leave, we would offer—

I.

That the decision in Commonwealth *vs.* Citizens' Bank, 80 Southwestern Rep., 158, *Ibid.*, 479, and London *vs.* Hope, *Ibid.*, 817, cannot conclude the bank's rights, because the

bank would have been assessed in 1900 had it not obtained an injunction, and assessed under the act of March 21, 1900, without regard to what the court of appeals might have thought about the act in 1904 as expounded in Commonwealth *vs.* Citizens' Bank.

The declaration of the court of appeals (80 Southwestern Rep., 160) that the assessor would be presumed to do his duty as required by section 5219, United States Revised Statutes, can have no weight in this controversy, for we claim rights under a Federal law, and the Kentucky court's opinion as to what the State assessor would do under a Federal statute (or even a State statute, for that matter) is entitled to no conclusiveness. The State court cannot, years afterward, give such a meaning to a statute as to bind this court to hold that the statute does not offend Federal laws. The principle is the same as that moving this court to form an independent judgment as to the existence or extent of a contract impairment whereof is alleged.

The statute does not require any deduction of the value of real estate from the total value of the shares of stock, nor require any deduction of the value of Government bonds or other non-taxable securities (Van Allen *vs.* The Assessors, 3 Wall., 573; Owensboro *vs.* National Bank, 173 U. S., 677).

No provision was made in the act of March 21, 1900, for any deductions, and no deductions authorized in the assessment of national bank shares until 1904 (and our charter expired November, 1904). (See Acts 1904, p. 147.)

From March 21, 1900, the State banks have been assessed by franchise and capital (Kentucky Statutes, secs. 4077, 4078, etc.), while the national banks have been assessable for State taxation under the act of March, 1900.

In cities of the first, second, and third classes State banks, by the act of March 23, 1900, have been assessed *for city taxation* upon their shares. The banks in the cities aforesaid, however, have been assessable not only for city taxation, but for county and State taxation. Accordingly, since the act

of March 21, 1900, national banks have been assessable upon their shares, and since June, 1900, State banks for city taxation have been assessable upon their shares, but the county and State taxation upon their franchises and property. (See Acts 1900, p. 59, amending sec. 1 of Acts of 1898.)

The claim in the answer (Rec., p. 80) that the real estate would be deducted from the value of the shares is unavailing, because the assessor might change his method whenever he might see fit to conform to the act of March 21, 1900, it appearing, as aforesaid, that no statute required the deduction of the national bank's real estate from the value of the shares until the aforesaid act of 1904.

Respectfully submitted.

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Supreme Court of the United States.

Nos. 113 and 114.—October Term, 1904.

The City of Covington, Kentucky, and John N. Middendorf, Assessor of the City of Covington, Kentucky, Appellants, 113 *vs.* The First National Bank of Covington, Kentucky.	Appeals from the Circuit Court of the United States for the Eastern District of Kentucky.
The First National Bank of Covington, Kentucky, Appellant, 114 *vs.* The City of Covington, Kentucky, and John N. Middendorf, Assessor of the City of Covington, Kentucky.	

[April 17, 1905.]

This case was here upon a former appeal, which was dismissed for want of final decree in the court below. (*City of Covington* v. *Covington First National Bank*, 185 U. S. 270.)

The original action was brought to enjoin the assessment or collection of taxes on certain shares of capital stock of the First National Bank of Covington for the years from 1893 to 1900, inclusive, and to enjoin the arrest of the president and cashier of the bank for not listing such shares, and for a decree adjudicating the same not liable to taxation up to the time of the expiration of the charter of the bank on November 17, 1904.

The principal grounds alleged and relied upon are that by reason of the acceptance of the terms of the act of the general assembly of Kentucky, passed in 1886, known as the Hewitt law, an irrevocable contract had been made between the bank and the State, whereby the former was to pay to the State taxes at a certain rate on its stock, surplus and undivided profits, which, when paid, were to be in full of all other State, county or municipal taxes, except those levied on the bank's real estate. It was averred that complainant had regularly paid such taxes up to and including those due July 1, 1900. That the fact that the bank had such irrevocable contract had been adjudicated and finally determined by a decision in the Court of Appeals of Kentucky in a litigation wherein the State and the city of Covington and the bank were parties. The bill further set up that an attempt was being made to compel the complainant to list for taxation its shares of stock under an act of the State of Kentucky, passed

March 21, 1900, (Session Acts 1900, p. 65.) The act under which the taxes were assessed is given in the margin of the opinion in the case of *Covington* v. *Covington First National Bank*, (185 U. S. *supra*,) and for convenience of reference is also inserted in the margin here.* It was also averred in the bill that the act of March 21, 1900, which undertakes to impose taxes for the years 1893 and following, is unconstitutional and void, and operates to discriminate against the complainant, in violation of section 5219 of the Revised Statutes of the United States. The defendants having filed a plea to the jurisdiction and a general demurrer to the bill, upon motion for a temporary injunction, attempts to enforce taxes levied or assessed upon the shares of capital stock at any time previous to March 21, 1900, were enjoined. (103 Fed. Rep. 523.)

December 17, 1900, a decree was entered, but not being final the writ of error was dismissed. (185 U. S. *supra*.) After the case was sent back to the Circuit Court the prior decision in that court was followed, and it was further held that the judgment of the State court was not a bar to the right to collect taxes for other years than the year directly involved in the judgment set up, and that as the Hewitt law and its acceptance by the bank had been conclusively held not to constitute an irrevocable contract as to taxes between the State and the complainant, and as the law was valid as

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*"An act relating to the taxation of the shares of stock of national banks.

"Whereas, the Supreme Court of the United States has lately decided that article three (3), chapter one hundred and three (103), of the acts of eighteen hundred and ninety-one, eighteen hundred and ninety-two, and eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"SEC. 2 For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: *Provided*, That where any national bank has heretofore, for any year or years paid

to future taxation the injunction could not be granted as to taxes assessed under the law of March 21, 1900, after its passage. A decree was, therefore, entered, dismissing the complainant's bill as to taxes levied after said date, and permitting the former decree enjoining the assessment and levying of taxes before the passage of the law to stand. (129 Fed. Rep. 792.)

From so much of the decree as enjoined the taxes assessed prior to March 21, 1900, the city appealed; from so much thereof as refused the injunction and dismissed the bill as to taxes assessed after that date, the bank appealed. Both appeals are now before this court.

Mr. Justice DAY delivered the opinion of the Court.

That the acceptance of the provisions of the so-called Hewitt law did not constitute an irrevocable contract, releasing the bank from taxes upon compliance with its terms, has been settled. (*Bank Tax Cases*, 102 Ky. 174; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636.) Reference is made to the various cases leading up to this result in *Deposit Bank* v. *Frankfort*, (191 U. S. 499, 508.) We are, therefore, left upon this branch of the case to consider the effect of the judgment of the State court of Kentucky, set up in the complainant's bill as an adjudication of the rights of the parties and a final determination that the acceptance of the Hewitt

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taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: *And provided further*, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

"SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

"SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

"SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

Approved March 21, 1900.

law had the effect of a valid contract. When this case was before the Circuit Court for the second time, (129 Fed. Rep. 792,) Judge Cochran, after an elaborate review of the Kentucky cases, reached the conclusion that as the taxes involved in the case in which the adjudication was had were for a different year than those involved in this suit, the former judgment did not have the effect of an estoppel between the parties, being only conclusive, under the Kentucky decisions, as to taxes in the years involved in the suit in which the judgment was rendered. We do not doubt that this is the settled law of the Supreme Court of Kentucky. Nor does it make any difference, in the view which that court takes of the matter, that the adjudication as to the right to collect the taxes involved the finding of an exemption by contract, which included not only the taxes for the years in suit, but all taxes which might be levied under the authority of the contract. The ground upon which the court based its decision with reference to the effect of such adjudication is stated in the case of *City of Newport* v. *Commonwealth*, (106 Ky. 444,) as follows:

"The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. . . .

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay, and the right to litigate the legality of a tax upon all grounds must of necessity exist, regardless of former adjudications as to the validity of a different tax."

It is unnecessary to cite the cases; they will be found in Judge Cochran's opinion. It is sufficient to say that if this case had been decided in the State court in Kentucky the adjudication pleaded herein, not involving taxes for the same years as those now in controversy, would not avail as an estoppel between the parties. It is true that a different rule prevails in the courts of the United States. The reasons therefor were stated in an opinion by Mr. Justice White, speaking for the court, in the case of *New Orleans* v. *Citizens' Bank*, (167 U. S. 371,) and in cases arising in a Federal jurisdiction the doctrine therein announced will doubtless be adhered to. The learned counsel for the plaintiff in error refer to the decision of this court in *Deposit Bank* v. *Frankfort*, (191 U. S. *supra*,) as authority for the doctrine that where a contract right has been adjudicated which involves an exemption from all taxation such adjudication will

conclude the parties as to the right to legally tax for other years, although the particular year was not directly involved in the suit in which the adjudication was made. But in that case the court was dealing with the effect to be given to a judgment of a Federal court in which such contract right had been adjudicated, when the Federal judgment was set up in a State court; and in that case it was recognized, in the opinion of the court as well as in the dissenting opinion, that the courts of Kentucky, in giving effect to the judgments of their own courts, were guided by a different rule, and in that State an adjudication involving taxes for one year cannot be pleaded as an estoppel in suits involving taxes for other years. (191 U. S. 514, 524.)

The case of *Deposit Bank* v. *Frankfort* was only concerned with the effect to be given to a Federal judgment adjudicating a contract right, when pleaded in a State court. We are now dealing with the weight to be attached to a State judgment when pleaded as *res judicata* in a Federal court. That was the very question decided by this court in the case of *Union & Planters Bank* v. *Memphis*, (189 U. S. 71,) wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered. Upon this branch of the case the question then is, What effect is given in the courts of Kentucky to such pleas of estoppel? As we have seen, it is there settled that the judgment would not be effectual to protect the alleged contract rights of the complainant as to the taxes involved for years other than the one directly involved in the adjudication set up. We, therefore, find no error in the judgment of the Circuit Court refusing an injunction upon the ground of an estoppel by judgment.

As to the taxes for the years prior to the passage of the act of March 21, 1900, it is argued by the bank that to give this retroactive effect to the law will be to deprive it and its stockholders of their property without due process of law, and will be in violation of section 5219 of the Revised Statutes, prohibiting discrimination against national banks and their stockholders. The act of March 21, 1900, as stated in the preamble, was passed because of a decision of this court holding prior legislation of the State undertaking to tax the property of national banks unconstitutional. (*Owensboro Bank* v. *Owensboro*, 173 U. S. 664.) In the Owensboro case it was held that section 5219, Rev. Stats. U. S., was the measure of the power of the State to tax national banks, their property or franchises, which power was confined to the taxing of the stock in the name of the shareholders and the assessment of the real estate of the banks, and that taxation under the laws of the State of Kentucky upon the franchise of the bank was not within the purview of the authority conferred by the

act of Congress, and was therefore illegal. Section 5219 of the Revised Statutes of the United States is as follows:

"SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Under the new taxing law, (Act of March 21, 1900,) it is declared to be the purpose to require the bank to return the shares of stock for the years prior to 1900, and since the adoption of the revenue law of 1892, with the privileges and deductions stated in section 3 of the act. Notwithstanding the prior revenue law had been held invalid, and there was no statute specifically taxing these shares of national bank stock on the statute books of Kentucky, prior to the passage of the act of March 21, 1900, the Supreme Court of Kentucky, in the case of *Scobee* v. *Bean*, (109 Ky. 526,) has held that there was ample statute law in that State for the taxing of shares in national banks under the laws of that State providing for the taxation of real and personal property of every kind, and that the provision that the individual shareholder in a corporation shall not be required to list his property therein so long as the corporation pays the taxes on its property of every kind, impliedly requires the individual to list his shares and pay the tax in the absence of the return required by law of the corporation. In that case the court held that there was nothing in its decisions running counter to section 5219. These views were further enforced in *Commonwealth* v. *Citizens' National Bank*, (80 S. W. 158;) *Town of London* v. *Hope*, (80 S. W. 817;) *Citizens' National Bank of Lebanon* v. *Commonwealth*, 25 Ky. L. R. 2254.) Following the State court in the interpretation of its own statutes, it may be said that, as to shareholders residing in Kentucky and over whom the State has jurisdiction, the Supreme Court of that State has construed its statutes as requiring shareholders in national banks for the years 1893 to 1900, inclusive, to return their shares for taxation; and if they did not make the return the duty was required of the corporation. In this view of the law it may be that, as to local shareholders, the act of March 21, 1900, as held by the Supreme Court of Kentucky, created no new right of taxation, but gave simply a new remedy, which by the law, is operative to enforce pre-existing

obligations. It may be admitted that section 5219 permits the State to require the bank to pay the tax for the shareholders. (*National Bank* v. *Commonwealth*, 9 Wall. 353; *Van Slyke* v. *Wisconsin*, 154 U. S. 581; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440.)

But there is nothing in the general statutes of Kentucky before the act of March 23, 1900, specifically requiring national banks to return shares of stock in the corporation when such shares are held by persons domiciled beyond the State. The situs of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the State as the agent of the owner, is at the domicil of the owner. (Cooley on Taxation, 16.) It is true that the State may require its own corporations to return the foreign-held shares for the owner for the purposes of taxation. (*Corry* v. *The Mayor and Council of Baltimore*, 196 U. S. 466.) Section 5219, Rev. Stats. authorizes the State to tax all the shares of a national banking association, including those owned by non-residents, as well as those owned in the State, in the city or town where the bank is located, but this section does not itself impose the tax; it is authority for State legislation to thus tax national bank shareholders. And this statute is express authority to the State by appropriate legislation to make the bank the agent of the shareholders for the purpose of returning the shares and paying the taxes thereon.

In *Commonwealth* v. *Citizens' National Bank*, (80 S. W. 158,) the Kentucky Court of Appeals seems to have held that a national bank might be required, under § 4241, Kentucky Statutes of 1903, to return the shares held in it for the years 1893 to 1900 inclusive, as omitted property. In that case it is said: "It was held under the previous statute that the shares of stock in national banks might be assessed to the shareholder by the assessor, and should be given in by the shareholder in the list of his personal property. (*Scobee* v. *Bean*, 109 Ky. 526; 59 S. W. 860.) The act of March 21, 1900, did not, it was held, therefore, make that taxable which was not taxable before, but simply provided another mode for the assessment of the shares of stock and the payment of taxes. It was the duty of the assessor to make the assessment, it was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made the property was simply omitted from the tax list, and the sheriff is authorized by section 4241, Ky. Stat. 1903, to institute the proceeding to have any omitted property assessed." And the court further held the bank liable for the penalty imposed for not listing taxable property. The ground upon which this judgment rests is that shareholders were bound to return the shares in the years from 1893 to 1900 under the then existing State law, and the act of 1900 made the bank the agent of the shareholders and did not require a new duty, but only imposed the duty upon the agent as a means of making effectual the former obligation of

the shareholders. None of the Kentucky cases deals with the effect of the requirement under the act of 1900, that the bank return the shares of stock held by foreign stockholders, who clearly were not required under the previous laws of that State to return shares of stock when neither the shares nor the owners were within the Sate.

Section 5219 requires that a State in taxing national banks shall be subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other capital in the hands of the individual citizen. Neither this section nor section 5210 of the Revised Statutes, requiring a list of the shareholders to be kept by the bank, has the effect to levy taxes. It is a limitation upon the right of the State, and the State must not discriminate against national banks by the use of methods of taxation differing from those in use in taxing other moneyed capital in the hands of individual citizens.

It is averred in the amended bill, and the answer having been stricken from the files and the case submitted upon the plea to the jurisdiction and general demurrer, it must be taken as true "that during said years [1893 to 1900] many of its shareholders were non-residents of the State of Kentucky, who, in many instances, have sold and transferred their shares of stock during said time."

The statutes of the State of Kentucky, which have been construed by the Supreme Court of that State in the cases cited, to require the payment of taxes by the shareholders or by the bank for its shareholders, can have reference only to shareholders within the jurisdiction of the State. Whether the system operates as a discrimination against national banks within the prohibition of section 5219, involving, as it does, a right of Federal creation must be ultimately determined in this court. The act of March 21, 1900, imposes upon the bank a liability for taxes assessed upon its shareholders, whether within or without the State. This liability did not exist before the passage of the act, and in *Commonwealth* v. *Citizens' National Bank*, *supra*, the Court of Appeals of Kentucky held that the statutes of the State made the bank liable for a penalty of twenty per cent for the years 1893 to 1900, inclusive. It seems to us that to permit the statute to require the bank to return the shares of such foreign-held stock, and be subjected to a penalty in addition, is imposing upon national banks a burden not borne by other moneyed capital within the State. In support of the equivalency of taxation, which it is the purpose of section 5219 to require, this court said, in *Owensboro National Bank* v. *Owensboro* (173 U. S. 664, 676): "The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact."

Without considering the question of constitutional power to tax non-resident shareholders by means of this retroactive law, it seems to us that

in imposing upon the bank the liability for the past years, for taxes and penalty, upon stock held without the State, and which before the taking effect of the act under consideration it was not required to return, there has been imposed upon national banks in this retroactive feature of the law a burden not borne by other moneyed capital in the State. This law makes a bank liable for taxes upon property beyond the jurisdiction of the State, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in § 5219, thus imposing a burden not borne by other moneyed capital within the State.

We think the Circuit Court was right in that part of the decree which enjoined the collection of taxes against the bank for the years 1893 to 1900, inclusive.

As to the alleged discrimination against shareholders in national banks because the assessment of the property of State banks is upon the franchise and not upon the shares of stock, there is nothing in the bill to show that this difference in method operates to discriminate against national bank shareholders by assessing their property at higher rates than are imposed upon capital invested in State banks. And as to the deduction of the value of real estate and other deductions allowed to State banks, the Supreme Court of Kentucky has held that all deductions allowed to State banks must be allowed in like manner in assessing the property of shareholders in national banks. (*Commonwealth* v. *Citizens' Bank*, 80 S. W. 158.) Nor does the allegation that in cities of the first, second and third class State banks are assessed upon their shares for city taxation, but upon their franchises and property for State and county taxation, in the absence of averments of fact showing that thereby a heavier burden of taxation is imposed upon national than State banks in such cities, warrant judicial interference for the protection of shareholders in national banks. (*Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83.)

Judgment affirmed.

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Test:

Clerk Supreme Court, U. S.